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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 72-31

HONOLULU RAPID TRANSIT COMPANY, LIMITED,
Petitioner

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF HAWAII, and THE CITY AND COUNTY OF HONOLULU,
Respondents

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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Respondents

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

The petitioner Honolulu Rapid Transit Company, Limited, (HRT), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on April 11, 1972.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in Appendix A (p. 1, *infra*).

The opinion of the District Court for the District of Hawaii, not reported, appears in Appendix B (p. 9, *infra*).

JURISDICTION

The judgment of the Court of Appeals was entered on April 11, 1972. This petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether governmental acquisition of privately owned public utility properties pursuant to the terms of a statutory franchise must meet the constitutional requirement of just compensation for taking private property when the statutory franchise specifies a lesser amount.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following laws, quoted in pertinent part, are relevant to this matter.

Constitution of the United States, Amendment V:

> No person . . . shall . . . be deprived of . . . property, without due process of law, nor shall

private property be taken for public use, without just compensation.

Constitution of the United States, Fourteenth Amendment, Section 1:

> . . . nor shall any State deprive any person of . . . property, without due process of law . . .

The Organic Act for the Territory of Hawaii (Act of April 30, 1900, Ch. 339, §55, 31 Stat. 141 as amended May 27, 1910, Ch. 258, §4, 36 Stat. 443) pursuant to which the statutory franchise was enacted (Section 55 is printed in full in Appendix C, *infra,* p. 29):

> Section 55. That the legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States locally applicable. . . . but the legislature shall not grant to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise without the approval of Congress; . . . .

The statutory franchise under which petitioner had operated since 1922 (§20, Act 186, Session Laws of Hawaii 1921; printed in full in Appendix D, *infra,* p. 32; Act of August 24, 1921, Ch. 81, 42 Stat. 185; printed in full in Appendix E, *infra,* p. 59):

> The amount to be paid to the company for such purchase shall be determined by the public utilities commission; but such amount shall in no case exceed the actual cost of the physical property thereof, or the actual value of the tangible property so purchased; in both cases, less its bonded and all other debts and liabilities. The value of

the franchise or good will or any other intangible element shall not be considered in determining the amount to be paid.

STATEMENT OF THE CASE

Petitioner is a Hawaii corporation which provided public transportation services in the City and County of Honolulu through 1970 (Cl.R. 2). The corporation was formed in 1898 when the Republic of Hawaii granted a 30-year franchise to operate a public street railway (Cl.R. 43, 59; *Morita v. Public Utilities Commission* (1954) 40 Hawaii 579).

In 1921, the Hawaii Public Utilities Commission, (PUC), pursuant to a 1919 resolution of the Hawaii Legislature, submitted a proposed franchise to the legislature (Cl.R. 243, 246). The proposal, as redrafted by the Hawaii Senate Judiciary Committee provided for acquisition of the public utility properties of HRT without payment of just compensation. The bill was passed by the Hawaii Legislature and signed by the Governor, becoming Act 186, Session Laws of Hawaii (1921) (Cl.R. 62). Act 186 was then submitted to Congress as required by the Organic Act, §55, and approved as written except for deletion of a provision requiring Congressional approval of any future changes. The President signed the bill approving the franchise (Act of August 24, 1921, Ch. 81, 42 Stat. 185).

The new franchise was then submitted to HRT for acceptance.

The alternatives open to HRT, set forth in a directors' report to the shareholders, were as follows: (1) to liquidate and go out of business; (2) to attempt to obtain a new franchise; or (3) to accept Act 186 as offered (Cl.R. 49-56). The directors concluded, as a practical matter, that the only way to remain in business and to render continuing and efficient service to the community was to accept Act 186 as offered (see Cl.R. 54-57). The shareholders acted on the directors' recommendations and voted to accept Act 186 (Cl.R. 43).

In 1967, Section 20 of Act 186 was amended to provide that the City and County of Honolulu (City) could determine to purchase HRT's property by vote of the City Council rather than by majority vote at a special election (Act 300, Session Laws of Hawaii 1967).[1] On August 25, 1970, the City adopted a resolution requesting the PUC to value HRT's property pursuant to Section 20 of Act 186 (Cl.R. 5, 43, 84, 362), and the City subsequently filed an application for such a valuation (Cl.R. 5, 43, 85-109).

HRT then brought this action in the federal District Court against the members of the PUC and the City. The complaint sought (1) a declaration that Section 20 of Act 186, Session Laws of Hawaii 1921, as ap-

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[1]The Hawaii Legislature previously had unilaterally amended Act 186 on several occasions (Act 227, Session Laws of Hawaii 1925; Act 253, Session Laws of Hawaii 1929; Act 114, Session Laws of Hawaii 1933; Act 116, Session Laws of Hawaii 1935; Act 133, Session Laws of Hawaii 1947; Act 149, Session Laws of Hawaii 1949; Act 134, Session Laws of Hawaii 1961). None of these changes pertained to Section 20 of Act 186.

proved by the Act of August 24, 1921, Ch. 81, 42 Stat. 185 (hereinafter "Act 186"), is unconstitutional because it appeared to provide for the taking of HRT's property for public use without the payment of just compensation, and (2) an injunction against the proceedings instituted in PUC which are intended to implement the unconstitutional provisions of Section 20 of Act 186 (Cl.R. 2-3, 12-14).

The District Court dismissed the action, holding that a government body could include in the grant of a statutory franchise any provision it wished—including one for the taking of private property for public use without the payment of just compensation (Cl.R. 450-453).

On appeal to the Ninth Circuit, the decision and judgment of the District Court was affirmed.

Valuation proceedings were conducted by PUC following dismissal of the District Court action (Reply Brief of Appellant [hereinafter Reply Brief] at 3, *Honolulu Rapid Transit Company, Limited, et al. v. Dolim, et al.*, ... F.2d ..... (9th Cir. 1972)). The parties to that proceeding, HRT and the City, stipulated therein that the fair market value of utility properties to be taken, not including going concern elements, was $8,090,911 (Reply Brief at 3, and Appendix A to Reply Brief at i-v). The undisputed evidence showed going concern elements to be worth $1,530,218, for a total fair market value of the utility amounting to $9,621,129 (Reply Brief at 3). The PUC awarded HRT the amount of $2,917,715 (Reply Brief at 3 and Appendix B to Reply Brief at vi-xii).

REASONS FOR GRANTING CERTIORARI

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THE COURT

a. The Constitutional Issue.

The expenditure of money by federal, state and local governments in this country has reached a level which is almost incomprehensible to its citizens. The amounts are measured in hundreds of billions of dollars and are a substantial portion of the gross national product. Beyond expenditures of dollars, governments also have regulatory control over the activities of citizens with a similarly substantial impact.

Governmental powers are not unlimited however. They may be limited to constitutionally stated powers. Even if such powers flow from residuary government powers, the due process requirements of the Fifth and Fourteenth Amendments to the Constitution apply.

A basic limitation on the powers of governments is the doctrine of unconstitutional conditions. It was initially set forth in *Frost & Frost Trucking Co. v. Railroad Commission* (1926) 271 U.S. 583 which held that although the government had the power to absolutely withhold a benefit or privilege from its citizens, such benefit or privilege could not be conditioned upon the beneficiary's promise to relinquish its constitutionally guaranteed right. In explaining the rule, the Court said:

> There is involved in the inquiry not a single power, but two distinct powers. One of these—the power to prohibit the use of the public highways in proper cases—the state possesses; and the other —the power to compel a private carrier to assume

> against his will the duties and burdens of a common carrier—the state does not possess. It is clear that any attempt to exert the latter, separately and substantively, must fall before the paramount authority of the Constitution. May it stand in the conditional form in which it is here made? If so, constitutional guaranties, so carefully safeguarded against direct assault, are open to destruction by the indirect but no less effective process of requiring a surrender, which, though, in form voluntary, in fact lacks none of the elements of compulsion. Having regard to form alone, the act here is an offer to the private carrier of a privilege, which the state may grant or deny, upon a condition, which the carrier is free to accept or reject. In reality, the carrier is given no choice, except a choice between the rock and the whirlpool,—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden.
>
> 271 U.S. at 593.

In the present case, the position of petitioner HRT is equivalent to that of Frost Trucking in *Frost*. Both the District Court and the Court of Appeals ignored the Supreme Court requirements set forth in *Frost*.

The Petitioner HRT was faced with a "choice" in 1921. It could terminate its business or accept the onerous provision of the tendered franchise. It had been operating under a 30-year franchise granted in 1898 by the Republic of Hawaii. Additional capital was required to improve and better the system in order to serve the public, but the short remaining term was inadequate to recover such an investment. The Terri-

torial Legislature, by statute pursuant to the Organic Act, and with the approval of Congress and the President, offered HRT a new franchise.

The franchise was of indefinite duration, and embodied two distinct governmental powers. One concerned operation of the utility. Government regulation ensured that HRT would provide public service and would receive a fair return on investment.

The other power embodied in the franchise concerned acquisition of the utility by the government for its use, the issue here in dispute. This portion of the franchise provided that the public utility assets could be acquired by the government without payment of constitutionally required just compensation.

In form, the franchise was "accepted" by HRT following a stockholders' meeting. Operations were conducted through 1970 under the operational provisions of the franchise. When the government sought to apply the unconstitutional acquisition condition, this action was filed and HRT attacked the provision.

This situation is covered by *Frost*. HRT was offered a benefit or privilege, the right to operate under franchise, upon the conditions that (1) HRT provide regulated utility service to the public for a regulated fair return on investment, and (2) the local government could acquire the privately owned utility property upon demand without payment of just compensation.

Standing alone, the latter condition would fall under the test of the Fifth and Fourteenth Amendments. No government limited by the federal Constitution has

the power to take private property for its use without payment of just compensation.

Duncan v. Louisiana (1968) 391 U.S. 145, 147-148;

West v. Central & Potomac Telephone Co. (1935) 295 U.S. 662, 671; and

Chicago, Burlington and Quincy Railroad Co. v. Chicago (1897) 166 U.S. 226, 241.

Nor may this unconstitutional condition stand because it is appended to an otherwise valid regulatory scheme. See *United States v. Butler* (1936) 297 U.S. 1, 70-78. The condition is not necessary to protect the government under the primary objectives of the franchise, i.e., operations. HRT would agree that governmental acquisition of the utility could probably be justified. However, there is no legitimate governmental need to acquire that property without payment of fair and just compensation.

This Court has recently restated the test. A condition infringing upon constitutional rights which the beneficiary must accept to receive a governmental benefit is valid only if it is reasonably necessary to accomplish lawful government objectives. *Wyman v. James* (1971) 400 U.S. 309, 326.

b. The Decisions Below.

Neither the District Court nor the Ninth Circuit made any attempt to analyze the franchise in terms of *Frost* doctrine considerations. For instance, there is no showing that the unconstitutional condition is necessary to further legitimate governmental objectives, nor is there any showing that it will ensure ef-

fective operation of the utility, nor any showing that the condition is necessary to protect the government from abuses under the operational provision of the franchise.

An unconstitutional condition appended to a regulatory scheme should be valid only when it is employed to protect a social interest endangered by activity in the regulated area and when the means adopted are the only means suited to protection of that interest. Only then can the erosion of constitutional safeguards be prevented. See Unconstitutional Condition, 73 Harv. L. Rev. 1595, 1600, 1603 (1960).

The Courts below attempted to avoid the requirements of *Frost* by saying that there was no taking by the government in a constitutional sense, on the rationale that this franchise was of the nature of an ordinary contract. Such rationale is not satisfactory.

The record shows that the government adopted the franchise and presented it to HRT on a take it or leave it basis. There was no negotiating or bidding as would occur when a government contract is let or an eminent domain lawsuit is settled. Apparently, HRT should have stuck to its rights under the old franchise, rejected the new franchise, and let the public be damned.

As the Court said in *Frost,* in form, HRT is free to accept or reject, but in reality there is no choice between the rock and the whirlpool. 271 U.S. at 593.

The other argument that there was no governmental action which amounts to a taking in the constitutional sense is erroneous. The franchise was a bill of the Territorial Legislature, and was signed by the Terri-

torial Governor. This legislation was authorized by the United States Government under the Organic Act, which also made the U.S. Constitution applicable to the Territory. The act of the Territory was sent to the Congress which approved it, and the President then signed it. Now the City is seeking to enforce the unconstitutional statutory provision in the PUC of the state which has regulated HRT for years. There was and is virtually nothing but governmental action in this matter.

To uphold the unconstitutional condition by saying that the franchise was a consensual agreement or that there was no constitutionally limited governmental action is contrary to the record and is contrary to the pronouncements of this Court.

Whatever use the label "acceptance of the franchise" may have outside this case, it should have no substantial bearing on the issues herein. The decisions of this Court do not recognize "acceptance" of a benefit or privilege as validating an unconstitutional condition. *Garrity v. New Jersey* (1967) 385 U.S. 493; *United States v. Chicago, Milwaukee, St. Paul and Pacific Railroad Co.* (1931) 282 U.S. 311, 328-29.

The Ninth Circuit relied on two lines of authority to support its decision.

One group involves cases dealing with dams and impediments to navigable waters and commerce. *United States v. Appalachian Power Co.* (1940) 311 U.S. 377; *Fox River Paper Co. v. Railroad Commission* (1927) 274 U.S. 651; and *Portland General Electric Co. v. Federal Power Commission* (9th Cir. 1964) 328 F.2d

167. These cases are not relevant to the issue now before the Court because they were concernd with taking "property" within "the federal [or state] domain, an area which Congress [or the state] can completely pre-empt, leaving no vested private claims that constitute 'private property' within the meaning of the Fifth Amendment." *United States v. Twin City Power Co.* (1956) 350 U.S. 222, 227. But from this, it does not follow that the government can acquire constitutionally recognized private property without payment of just compensation. What these authorities do mean is that a government need not pay just compensation for property which is not constitutionally recognized as private property. The privately owned public utility property of HRT is private property within the meaning of the Fifth Amendment. *ICC v. Oregon-Washington Railroad & Navigation Co.* (1933) 288 U.S. 14, 40-41.

In the City's answering brief below, these authorities were conceded to be inapplicable (Answering Brief of Appellee-City at 24, *Honolulu Rapid Transit Company, et al. v. Dolim, et al.*, ... F.2d ..... (9th Cir. 1972)).

The other authority cited by the Ninth Circuit is *Albrecht v. United States* (1947) 329 U.S. 599. In that case, a property owner under threat of condemnation agreed to sell his property to the government. The sales contract did not provide for interest between the time of taking and payment but did fix compensation amounts which "were not just, but were excessive." 329 U.S. at 603. The government tried unsuccessfully to get out of the contract in order to achieve

a lesser just compensation amount at trial. The condemnee stood by its excessive contract price, and argued its right to interest as just compensation in addition. This Court denied the latter.

Albrecht is distinguishable from this matter. The basic objective in the *Albrecht* contract was determination of just compensation. All of the various considerations in determining just compensation, such as interest, had apparently been merged into the contract amount. 329 U.S. at 604. The time spanned by the contract was relatively short. And perhaps most importantly, the condemnee could achieve just compensation by disavowing the contract which he chose not to do—he stood on the contract throughout the proceedings.

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2. THE DECISION BELOW OF THE NINTH CIRCUIT CONFLICTS WITH THE DECISIONS OF THE FIFTH CIRCUIT AND THE EIGHTH CIRCUIT.

a. United Gas Pipeline Company v. Terrebonne Parish Police Jury, 445 F.2d 301 (1971, 5th Cir.) aff'g 319 F. Supp. 1138 (E.D.La. 1970).

Plaintiff in this case owned gas pipelines. It sought to construct a new pipeline which would intersect defendant's public road. Defendant offered plaintiff a permit to lay its pipe under defendant's road upon the condition that plaintiff agree to pay the cost of relocating, altering or removing its pipeline outside of the highway or road right-of-way.

Plaintiff sued for a permit without the condition, arguing that the doctrine of unconstitutional conditions prevented imposition of such condition. The District Court found this reason persuasive, stating:

> This condition precedent to the issuing of a permit would result in the taking of the pipeline company's property without the payment of just compensation in violation of the due process clause of the Fourteenth Amendment. [citations, including *Frost,* omitted] 319 F.Supp. at 1143.

In the first sentence of its per curiam decision, the United States Court of Appeals for the Fifth Circuit stated its agreement. 445 F.2d at 301.

b. Midwest Video Corporation v. United States, 441 F.2d 1322 (8th Cir. 1971), rev'd, 40 U.S.L.W. 4626 (U.S. June 7, 1972).

The Federal Communications Commission adopted rules for the community antenna television (CATV) industry. These rules required that CATV systems with more than 3,500 subscribers originate a certain amount of programming, referred to as cablecasting.

The regulatory authority of the FCC over CATV was not seriously questioned, but the FCC cablecasting requirement was attacked. The petitioner's first argument was that the Communication Act did not authorize the FCC to impose the cablecasting requirement, and the Court of Appeals agreed.

The FCC also sought to justify cablecasting as ancillary to its recognized regulatory power over CATV. It was argued that since the FCC had power to grant or deny CATV licenses, it could therefore impose the cablecasting requirement as a license condition.

To that argument, the Court said first, that

> [a] high probability exists that cablecasting will not be self-supporting and that the burden thereof would likely cause substantial increase in

> the amount that subscribers are required to pay for CATV service and in some instances may drive the CATV operators out of business. . . . 441 F.2d at 1327,

and then struck the cablecasting requirement on the authority of *Frost* (441 F.2d at 1327).

This Court granted certiorari, 404 U.S. 1014 (1972), and reversed, 40 U.S.L.W. 4626 (June 7, 1972). The cablecasting requirement was held to be "reasonably ancillary" to the purposes of the Communications Act. This conclusion seems to be consistent with the criteria for unconstitutional conditions. This Court, of course, did not reach the issue decided by the Eighth Circuit upon which petitioner HRT relies. Only if this Court had found the cablecasting requirement *not* reasonably ancillary to the purposes of the Communications Act would the unconstitutional conditions issue have been reached.

The Eighth Circuit decision would seem, therefore, to retain vitality on the unconstitutional condition issue where the requisite nexus to basic, legitimate governmental objectives does not exist.

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3. THE ISSUE NEEDS RESOLUTION BECAUSE IT HAS SUBSTANTIAL IMPACT ON TRANSACTIONS BETWEEN GOVERNMENT AND CITIZENS.

The Ninth Circuit has said in essence that the doctrine of unconstitutional conditions can be avoided if the government can clothe a transaction with an appropriate degree of "acceptance". But "acceptance" of

an unconstitutional condition is not a relevant fact in constitutional law.

Bell v. Burson (1971) 402 U.S. 535;
Wyman v. James (1971) 400 U.S. 309;
Shapiro v. Thompson (1969) 394 U.S. 618;
Thorpe v. Housing Authority (1967) 386 U.S. 670;
Garrity v. New Jersey (1967) 385 U.S. 493;
Spevack v. Klein (1967) 385 U.S. 511;
Sherbert v. Verner (1963) 374 U.S. 398;
Speiser v. Randall (1958) 357 U.S. 513;
Slochower v. Board of Education (1956) 350 U.S. 551;
Hanover Fire Insurance Co. v. Harding (1926) 272 U.S. 494;
Frost & Frost Trucking Co. v. Railroad Commission, supra;
Terral v. Burke Construction Co. (1922) 257 U.S. 529.

These decisions show the Court's concern against infringements of constitutional rights, whether "personal" or "proprietary", if indeed such a distinction is of consequence. See *Lynch v. Household Finance Corp.* (1972) ..... U.S. ....., 92 S.Ct. 1113.

The impact of the Ninth Circuit decision goes to most relationships between person and government—wherever the government has some privilege and benefit to bestow. In the area of public utilities alone, there are approximately 460 privately owned companies with 1970 stockholders equity at book value of $197 billion (Moody, Public Utility Manual (1971) and Moody, Transportation Manual (1971)). The gov-

ernmental granting authorities are now apparently in a position to condemn these properties at confiscatory prices as a condition of continued existence.

CONCLUSION

We submit that the Courts below followed a conceptually erroneous approach to a problem with the result that constitutional rights of all persons can now be easily eroded. A condition which both Courts below recognized as unconstitutional standing alone was appended to other legislation in violation of this Court's decisions. There was no reasonable and necessary relationship between the unconstitutional condition and the valid regulatory scheme. Consequently, the unconstitutional condition must fall.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Dated, Honolulu, Hawaii,
July 3, 1972.

Respectfully submitted,
HOWARD K. HODDICK,
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Of Counsel.

(Appendices Follow)

Appendix A

United States Court of Appeals
For The Ninth Circuit

No. 71-1216

Honolulu Rapid Transit Company, Limited, Wahiawa Transport System, Inc., Federal Enterprises, Ltd., Pali Bus Co., Ltd., Honolulu Scenic Tours, Inc., Honolulu, Limited, all Hawaii corporations,
Plaintiffs-Appellants,

vs.

Lorrin W. Dolim, John B. Fernandez, Shoji Okazaki, Edwin K. Wasano and The City and County of Honolulu, a municipal corporation,
Defendants-Appellees.

[April 11, 1972]

On Appeal from the United States District Court for the District of Hawaii

Before: MERRILL and DUNIWAY, Circuit Judges, and BELLONI, District Judge*

MERRILL, Circuit Judge:

Honolulu Rapid Transit (HRT) is a Hawaii corporation that provides public transportation services

*Honorable Robert C. Belloni, Chief United States District Judge for the District of Oregon, sitting by designation.

in the City of Honolulu. It was formed in 1898, when it received its first franchise from the Territory of Hawaii to operate a public street railway. With expiration of the franchise due within a few years the Legislature of Hawaii in 1921 enacted a new franchise, Act 186 Session Laws of Hawaii, 1921, which was duly approved by the Congress[1] and submitted to HRT for its acceptance. On recommendation of the board of directors, the shareholders voted to accept the franchise and HRT has since operated under it.

The franchise, by §20, permits the City of Honolulu to purchase HRT's property. Respecting the purchase price, it provides:

> "The amount to be paid to the company for such purchase shall be determined by the public utilities commission; but such amount shall in no case exceed the actual cost of the physical property thereof, or the actual value of the tangible property so purchased; in both cases, less its bonded and all other debts and liabilities. The value of the franchise or good will or any other intangible element shall not be considered in determining the amount to be paid."

In 1970 the City resolved to purchase HRT's property and applied to the Hawaii Public Utilities Commission for valuation pursuant to the franchise terms.

HRT then brought this suit seeking (1) a declaration that §20 is unconstitutional since it provides for

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[1]U.S. Public Law No. 61 (1921), 42 U.S. Stat. 185.

the taking of HRT's property for public use without payment of just compensation, and (2) an injunction against further proceedings before the Public Utilities Commission. The suit was dismissed by the District Court for failure to state a claim. We affirm.

HRT's position is that even though the Government has an absolute power to grant or withhold a privilege such as the statutory franchise here in question, it cannot exact a waiver of constitutional rights as the price of the grant.[2] HRT construes the purchase and price provisions of the franchise as such an exaction: a waiver of HRT's rights to receive just compensation should its property be taken by the City for public use.

HRT relies upon *Frost & Frost Trucking Co. v. Railroad Comm.* (1926), 271 U.S. 583. There the Court struck down state action conditioning use of its highways by a private trucker upon the trucker's assumption of the status and burdens of a common carrier. The Court stated:

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[2]It is well settled that the state may not condition the grant of a benefit upon the surrender of *religious freedom (Sherbert v. Verner*, 374 U.S. 398 (1963)), *freedom of speech (Lamont v. Postmaster*, 381 U.S. 301 1965)), *freedom from self-incrimination (Garrity v. N.J.*, 385 U.S. 493 (1967)), *freedom to use the federal courts (Terral v. Burke Construction Co.*, 257 U.S. 529 (1922)), *freedom from unconstitutional tax assessments (Hanover Fire Ins. Co. v. Harding*, 273 U.S. 494 (1926)), *and the freedom to operate one's business as a private rather than public instrumentality (Frost & Frost Trucking Co. v. Railroad Comm.*, 271 U.S. 583 (1926)).

> "It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence." (271 U.S. 593-594).

But HRT disregards the fact that there was here no "taking" by the City. This was not a unilateral exercise by the City of its power of eminent domain. The right of the City to acquire HRT's property at a certain price was not based upon its power to take, but upon agreement between the parties. Thus there was no event to which HRT's asserted constitutional rights attached. The transaction had "passed out of the range of the Fifth Amendment" and was a situation where "Parties, supposedly with due regard to their own interests, bargain between themselves as to

compensation." *Albrecht v. United States,* 329 U.S. 599, 603-04 (1947). To the same effect, *United States v. Appalachian Power Co.,* 311 U.S. 377 (1940); *Fox River Paper Co. v. R.R. Comm.,* 274 U.S. 651 (1927); *Portland General Electric Co. v. Fed. Power Comm.,* 328 F.2d 165 (9th Cir. 1964). *And see* Oppenheim, *Unconstitutional Conditions and State Powers,* 26 *Mich.L.R.* 186, 189 (1941).

HRT's contentions, if valid, would gravely prejudice if not destroy the power of government to utilize options to acquire property, through making it impossible for the seller to commit himself to a sale price. Hindsight would always be available to compel price adjustments on the theory that the price no longer constituted just compensation.

An exchange of economic benefits such as this franchise represents underlies every commercial contract and the Supreme Court has left no doubt that the Federal Government enjoys power to conclude commercial bargains. Further, it may employ the remedies available to private citizens in enforcing a contract. *Rex Trailer Co. v. United States,* 350 U.S. 148 (1956); *Perkins v. Lukens Steel Co.,* 310 U.S. 133 (1940). The states enjoy a parallel power *United States v. Bekins,* 304 U.S. 27 (1938). The doctrine of unconstitutional conditions does not strip state and federal governments of this indispensible and long acknowledged power.

Nor does the fact that the alternatives to the franchise available to HRT in 1921 were unattractive

render the agreement a coerced one. The acceptance of HRT was an act of free choice.[3]

Judgment affirmed.

[3]The parties do not dispute that, in 1921, HRT had the following option: The company could continue to operate under the original franchise at a profit until 1929, as it had since 1898. And, at the end of this period, it could sell its assets at fair market value to any willing buyer. Instead, however, HRT chose to conclude a second franchise agreement with the state. This resulted in fifty years additional operation as a state created monopoly in the street railway business. The *quid pro quo*, of course, was the transfer of company equipment to the state upon termination of franchise at a predetermined price. The choice confronting HRT was not a Hobson's choice. The Government merely demanded some recompense, in the public interest, for the continuation of exclusive franchise rights and the economic benefit conferred thereby. This entails no coercion. *See* I *Restatement of the Law of Contracts*, §§490-99.

United States Court of Appeals
For The Ninth Circuit

No. 71-1216

Honolulu Rapid Transit Co., Ltd., Wahiawa Transport System, Inc., Federal Enterprises, Ltd., Pali Bus Co., Ltd., Honolulu Scenic Tours, Inc., Honolulu, Ltd, all Hawaii corporations,

Appellants,

vs.

Lorrin W. Dolim, John B. Fernandez, Shoji Okazaki, Edwin K. Wasano and The City and County of Honolulu, a municipal corporation,

Appellees.

Appeal from the United States District Court for the District of Hawaii (Honolulu)

JUDGMENT

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Hawaii (Honolulu) and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of

the said District Court in this Cause be, and hereby is affirmed.

Filed and entered April 11, 1972.

A True Copy,
Attest: June 8, 1972.

Emil E. Melfi, Acting Clerk,
By R. D. Hewitt, Deputy.

Appendix B

In the United States District Court
for the District of Hawaii

Civil No. 70-3275

Honolulu Rapid Transit Company, Limited, Wahiawa Transport System, Inc., Federal Enterprises, Ltd., Pali Bus Co., Ltd., Honolulu Scenic Tours, Inc., Honolulu, Limited, all Hawaii corporations,

Plaintiffs,

vs.

Lorrin W. Dolim, John B. Fernandez, Shoji Okazaki, Edwin K. Wasano and The City and County of Honolulu, a municipal corporation,

Defendants.

[January 13, 1971]

DECISION DISMISSING COMPLAINT
AND
ORDER

In the United States District Court
for the District of Hawaii

Civil No. 70-3275

Honolulu Rapid Transit Company, Limited, Wahiawa Transport System, Inc., Federal Enterprises, Ltd., Pali Bus Co., Ltd., Honolulu Scenic Tours, Inc., Honolulu, Limited, all Hawaii corporations,

Plaintiffs.

vs.

Lorrin W. Dolim, John B. Fernandez, Shoji Okazaki, Edwin K. Wasano and The City and County of Honolulu, a municipal corporation,

Defendants.

DECISION GRANTING DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR FAILURE TO STATE A CLAIM ON WHICH RELIEF MAY BE GRANTED

This cause came on for hearing by the filing of the verified complaint of the Plaintiffs together with their ex parte motion for a temporary restraining order under the provisions of 28 U.S.C. 2284(3) alleging that substantial federal and constitutional questions had been raised requiring the invocation of a three-judge court to hear and determine said questions. A

temporary restraining order was issued by this Court on the 1st day of December, 1970 and thereafter arguments were heard following the submission of memoranda by the Plaintiffs in support of their motion for the invocation of a three-judge court, for a preliminary injunction pending a determination on the complaint filed herein and upon the motion of the Defendants to dismiss the complaint of the Plaintiffs on the grounds that the same did not state a claim on which relief could be granted as it did not raise any substantial federal or constitutional questions, plus various other grounds which for the reasons hereinafter stated need not be considered. By stipulation dated December 11, 1970, a copy of which is attached, Plaintiffs Wahiawa Transport System, Inc., Federal Enterprises, Ltd., Pali Bus Co., Ltd., Honolulu Scenic Tours, Inc., and Honolulu, Limited were dismissed as Plaintiffs, it being agreed by all the parties in this action that the acquisition of said companies will not proceed under Section 20 of Act 186, SLH 1921.

This memorandum of decision shall constitute such findings of fact and conclusions of law as are required to be made by Rule 52(a), FRCP.

All parties here are fully aware of the nature of the complaint, the parties involved and the real issues presented. The court addresses itself, therefore to the complaint that is filed. The first count thereof is that the Honolulu Rapid Transit Company, which shall be referred to hereafter as "HRT", alleges that the Defendants acting under the color of State law, have

unlawfully deprived HRT of its constitutional right to just compensation, due process of law, equal protection of law and its rights under 49 U.S.C. 1602(c) and 42 U.S.C. 3072.

The nature of the deprivation as set forth in Count 1, is that HRT has been deprived of an unbiased judicial determination of its right to just compensation by virtue of the filing, the prosecution of valuation proceedings by the Public Utilities Commission of the State of Hawaii, hereafter referred to as "PUC"; by the attempt to impose improper standards of valuation of its assets by the PUC; by being denied a going concern value and by seeking to eliminate compensation for intangibles. This is the so-called Civil Rights portion of the Plaintiff's case based on 42 U.S.C. 1983 which provides that:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Now it is manifest that a cursory reading of this section would lead one to believe that it is as broad as the sea; and, in some ways it is. It follows that anyone may push the smallest barge or the largest ship onto that sea, but it does not follow therefrom

that the barge or the ship will get past the breakers at the harbor's entrance.

Everyone who has worked with that particular civil rights section of the statutes, recognizes that the basic object of that section is to protect persons from the misuse of power possessed by virtue of a state law, and it grants to persons injured thereby a remedy at law. It is true, of course, that corporations under some circumstances may also be considered "persons". However, it is obvious that in spite of its broad language the act was not intended to turn every denial of a claimed right into a right protected by the U. S. Constitution with a Federal remedy. It is basically aimed at protecting persons against tortious or arbitrary acts by state authority, and that is the basic target—speaking generally—of 42 U.S.C. 1983. It is not an act which may be used to bring about the type of relief here sought by HRT.

The affidavits of the parties, the moving papers, the exhibits, all make it certain to this Court's mind, and this court so holds, that Plaintiff has no cause of action cognizable by this Court, and has not set forth one sufficiently to cause the Federal Court here to act under 42 U.S.C. 1983.

Accordingly, Count One is dismissed.

Count Two alleges that Plaintiff's complaint and petition present substantial Federal questions in that Section 20 of Act 186, SLH (hereafter referred to as Section 20 of the franchise), as it is now being implemented by the PUC, will take the property of HRT without just compensation, deprive Plaintiff of the

same without due process of law, and deny it the equal protection of law; rights protected by the 5th and 14th Amendments of the Federal Constitution.

Now there is no doubt that the amount in controversy exceeds $10,000.00. However, from the inception of this case, this Court has had great doubt as to whether a substantial Federal question was in fact presented.

As I will discuss subsequently, the purchase provided for in Section 20 of the franchise sets forth certain procedures which permit notice, hearing, opportunity to defend, and so forth. As this will be covered later, the court will simply decide right now that there is no denial of equal protection of the law, and that this Court, at the very threshold determines that the problems of HRT as set forth in the complaint, do not present Federal questions of such substantiality that this Court would even consider for the moment, calling a three-judge court.

Count Three goes into the matter of the ability of the City to receive Federal funds for the purpose of acquiring any mass transit system or otherwise becoming involved in mass transit. I have already ruled in the course of the argument that this is a collateral issue. The Plaintiff has no "right" to demand that the City enter into any Federal program at all. All the Plaintiff has the right to demand is that if its property is "taken" or "purchased", such "taking" or "purchase" is done properly under the terms of the franchise and Plaintiff is accorded due process and equal protection of the law.

Thus Count Three, as this Court has previously indicated, is so collateral that it is dismissed as having no import in the case before it.

Count Four prays for declaratory judgment. Plaintiff claims that the controversy here is such that the Defendants should be required to recognize the unconstitutionality of the valuation provisions of Section 20 of the franchise to prevent the Defendants from taking any action. Now there is nothing vague or uncertain about Section 20 that needs any basic interpretation. There is nothing vague or uncertain to the point that this Court feels that anything needs to be defined or interpreted within the spectrum of the Federal Constitution. As I have indicated in the course of oral argument, the franchise given to the HRT was and is a state granted privilege. Once upon a time it was a combination of a territorially and congressionally granted privilege, but the state has since inherited all the rights and liabilities of its predecessors.

When franchises are granted by a state or other governmental organization, they are a special privilege conferred by the state on the franchisee. A franchise is a privilege which does not in the absence of a grant exist, and which does not belong in this case, to the HRT as a matter of right. These principles have long been recognized by the Supreme Court of the State of Hawaii as well as the courts of other jurisdictions. Moreover, the grant of franchises have long been accepted as valid exercises of governmental power, and they have been held to be contracts which confer

special privileges upon the franchisee. As indicated in *Honolulu Gas Co. v. PUC,* 33 Haw. 487 (1935), "The purpose of a franchise is to transfer to the individual or company a special privilege to exercise part of the state's sovereign power, namely, the right to use the public highways in a manner imposing an additional burden . . ." It is hoped, of course, that the grant of a franchise will result in concomitant benefits to the public.

Now it has been held almost from the very beginning of our State and Federal laws, that the State or Federal Government, in giving these grants of special privileges, can set up almost any terms that it might desire. From the time of the *Dartmouth College*[1] case through the *Louisville Bridge*[2] case, and a multitude of other bridge cases, railroad cases, water cases, and so forth, the courts have been uniform in upholding the right of the grantor to set up practically any terms it chooses in laying out the franchise, the special privilege, the special grant of power to the franchisee. Moreover the courts have also ruled in a multitude of cases that these powers, these privileges, these rights, and all other terms of the franchise, shall be strictly construed in favor of the public right to protect the rights of the public.

Furthermore, this court finds that HRT voluntarily, with its eyes open and uncoerced, accepted this franchise in 1921. Indeed the internal communications of the company, submitted as an exhibit by HRT, leads

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[1]4 Wheat. (U.S.) 518 (1819).
[2]242 U.S. 409 (1917).

this court to the conclusion that HRT deliberately sought in substantially the same form the very franchise which was subsequently enacted. It did so on the firm belief that such an open end franchise was to their advantage, and they were perfectly willing to accept the terms regarding purchase when and if that should ever come about. Consequently, this court finds the *Frost*[3] case, relied on by the Plaintiff as authority for the proposition that an individual or corporation cannot be forced by a state to waive a constitutional right in exchange for the grant by the State of a privilege, to be inapplicable here.

So, with its eyes wide open, with an avid desire to get the open-end franchise, it is not for the HRT at this time, to say that they were coerced into it. They made a free and open choice. It is manifest, as this court observed during argument, that its directors believed that they could sell out at the end of the seven and a half or eight and a half years remaining on its then existing franchise and get all of its initial investment back plus 20 or 25% appreciation, and a profit of some 8% per year during the remainder of the franchise. However, it chose to forego the immediate gain to shoot for the much jucier [sic] and more lucrative profit that they felt an open-end franchise would give them; and for fifty years, HRT has had all the benefits they could hope to enjoy under that franchise.

It is not a part of the record, and this Court is not influenced by the fact that there has been a tremen-

[3]*Frost Trucking Co. v. Railroad Comm.*, 271 U.S. 583 (1926).

dous amount of publicity as to the way in which the HRT holdings have been diversified into other enterprises over the past several years through actions of the corporation itself, without in any way changing the make-up of the corporation or affecting its rights and privileges under the franchise. As I say these facts simply indicate to the Court that for 50 years the HRT has had all the benefits and profits its Board of Directors expected to enjoy under the franchise.

This court finds that the acquisition of HRT property under the franchise is not a condemnation situation, but as in *Janes v. The City of Racine*[4] all that is before this Court at this time is the fact that the City wants to purchase HRT property under the terms and conditions of the franchise contract made in 1921; a contract that HRT has become unhappy with. The day has come—a day that HRT's wisemen in 1921 perhaps never expected would come; namely that the City has finally decided it would acquire the property of the company under the terms of the franchise.

When one recognizes that HRT worked for the very contract that it now attacks, then the claimed unconstitutionality of Section 20 of the Franchise as a deprivation of its constitutional right reaches the point of frivolity in the face of the cases on this very problem. As this court has said, the cases are clear that the grant of a franchise by a subdivision of the State, or the State itself, and its acceptance by the grantee constitutes a contract. Since this proposition

[4]143 N.W. 707 (1913).

has been clearly and finally settled by the decisions of the courts of nearly every state of the union and the Supreme Court of the United States, the federal question raised by Plaintiff's complaint is very slight indeed when all the facts are before the Court. Thus, this Court finds that HRT, having gone into the contract with open eyes, and open ears, and open arms is bound by the terms thereof.

HRT has urged that it is denied equal protection because not all public utilities have the same clause in their franchise regarding takeover or purchase, and the valuation thereof. But the equal protection clause of the Constitution does not mean that every person must be treated exactly the same. In the granting of a franchise, a governing body may set up the terms of the franchise, and if there is no coercion involved when the franchisee accepts the contract, he cannot thereafter complain because some other franchisee, in some other category, as we have it in this case, may be treated differently. Absent the contract, absent the franchise, undoubtedly HRT would have been entitled to have its property taken under eminent domain and this is not denied by the City, but in view of the franchise this is not what HRT is entitled to. The due process clause of the Constitution does not demand that in the purchase of the property of HRT, that the City use eminent domain procedures, or even that HRT is entitled to a fair market value of all of the tangibles and intangibles including good will, etc. In the context of this case, due process simply means that the purchase or taking, if you will have

it that way, shall be made after HRT has had n
—and it has had notice; after it has had an op
tunity to be heard—and one is certainly going t
made available to it; and before a lawful tribun
and here you have not one, but two; namely the P
and the Supreme Court of the State of Hawaii
order to defend, enforce and protect the right
HRT.

Thus, HRT is, under the circumstances of this
given every facet of protection which the due pro
clause of the United States Constitution demand
be given. They get more than most, in that under
franchise they get not only a valuation by the Pu
Utilities Commission, but they get what is tantam
to a hearing *de-novo* before the Supreme Court of
State of Hawaii.

Finally, HRT has no vested right, that the se
of the franchise as it was originally enacted, w
stated that there could be no taking and purchas
the City until two-thirds of the citizens of the S
had voted on the same, remain unchanged particul
in view of the retained power to amend, alter or re
in Section 21 thereof. The statutory change, givin
the City Council the authority to decide whethe
not to make the purchase invaded no rights of H
HRT was in no way, in the context of this
affected by that change. Every right involved in
purchase and the valuation was still maintained
changed when the slight change in who would m
the decision to purchase was ingrafted by Act
SLH 1967, into the franchise. In any event, it is n

fest that HRT has no objection to the decision of the City Council to purchase property. Its only objection is as to the method of valuation of its property, and the limitations of price upon what HRT claims are its various valuable property rights.

Dated, Honolulu, Hawaii, this 13th day of January, 1971.

/s/ Martin Pence,
United States District Judge.

In the United States District Court
for the District of Hawaii

Civil No. 70-3275

Honolulu Rapid Transit Company, Limited, Wahiawa Transport System, Inc., Federal Enterprises, Ltd., Pali Bus Co., Ltd., Honolulu Scenic Tours, Inc., Honolulu, Limited, all Hawaii corporations,
Plaintiffs,

vs.

Lorrin W. Dolim, John B. Fernandez, Shoji Okazaki, Edwin K. Wasano and The City and County of Honolulu, a municipal corporation,
Defendants.

DECLARATORY JUDGMENT AND INJUNCTION

Stipulation and Order

Paul Devens 536
Corporation Counsel
City and County of Honolulu
Honolulu, Hawaii

David Y. Mar 320
Corporation Counsel
City and County of Honolulu
Honolulu, Hawaii

Attorneys for Defendant
City and County of Honolulu

In the United States District Court
for the District of Hawaii

Civil No. 70-3275

Honolulu Rapid Transit Company, Limited, Wahiawa Transport System, Inc., Federal Enterprises, Ltd., Pali Bus Co., Ltd., Honolulu Scenic Tours, Inc., Honolulu, Limited, all Hawaii corporations,
Plaintiffs,

vs.

Lorrin W. Dolim, John B. Fernandez, Shoji Okazaki, Edwin K. Wasano and The City and County of Honolulu, a municipal corporation,
Defendants.

DECLARATORY JUDGMENT AND INJUNCTION

Stipulation and Order

It Is Hereby Stipulated and Agreed by and between the attorneys for the respective parties hereto

that the City and County of Honolulu will not seek to purchase any of the property of any of the plaintiffs other than the Honolulu Rapid Transit Company, Limited pursuant to Sec. 20 of the statutory franchise which is the subject of this action, nor will the City and County include in its request for evaluation of the physical and tangible properties of the Honolulu Rapid Transit Company, Limited pending before the Public Utilities Commission of the State of Hawaii any such properties held or owned by plaintiffs other than the Honolulu Rapid Transit Company, Limited, and will, accordingly, delete from its present listing of assets to be valued by the Public Utilities Commission all property held or owned by plaintiffs other than the Honolulu Rapid Transit Company, Limited;

It Is Hereby Further Stipulated and Agreed that upon the approval hereof by the above named court, a copy hereof filed with the Public Utilities Commission of the State of Hawaii will constitute notice to the said Public Utilities Commission of the agreement of the parties hereto for all purposes in the matter now pending before the Public Utilities Commission; and

It Is Hereby Further Stipulated and Agreed that all plaintiffs hereinabove named other than the Honolulu Rapid Transit Company, Limited, be and are

hereby dismissed without prejudice from the above entitled action.

Dated: Honolulu, Hawaii, December 11, 1970.

City and County of Honolulu,
a municipal corporation, Defendant,
By Paul Devens
Corporation Counsel
By David Y. Mar
David Y. Mar
Deputy Corporation Counsel
Lorrin M. Dolim, John B. Fernandez,
Shoji Okazaki, and Edwin K. Wasaho
Defendants,
By Bertram T. Kanbara,
Attorney General, State of Hawaii
By Harry S. Y. Kim,
Harry S. Y. Kim
Deputy Attorney General
Honolulu Rapid Transit Company,
Limited, Wahiawa Transport System,
Inc., Federal Enterprises, Ltd., Pali Bus
Co., Ltd., Honolulu Scenic Tours, Inc.,
and Honolulu, Limited,
By Howard K. Hoddick,
Howard K. Hoddick,
Attorney for Plaintiffs

Approved and so Ordered:

Martin Pence,
United States District Judge

In the United States District Court
for the District of Hawaii

Civil No. 70-3275

Honolulu Rapid Transit Company, Limited, Wahiawa Transport System, Inc., Federal Enterprises, Ltd., Pali Bus Co., Ltd., Honolulu Scenic Tours, Inc., Honolulu, Limited, all Hawaii corporations,

Plaintiffs,

vs.

Lorrin W. Dolim, John B. Fernandez, Shoji Okazaki, Edwin K. Wasano, and The City and County of Honolulu, a municipal corporation,

Defendants.

ORDER

This cause having duly come for hearing on December 23, 1970, before the Honorable Martin Pence, Judge, United States District Court for the District of Hawaii, and Howard K. Hoddick, Peter Wheelon and John Hoskins, Esqs. having appeared on behalf of the above-named Plaintiffs, and Harry S. Y. Kim, Esq. having appeared for the above-named individual defendants, and Paul Devens, David Y. Mar and Robert M. Ehrhorn, Jr., Esqs. having appeared for the defendant City and County of Honolulu, and the Court having fully considered the pleadings and all

other matters filed herein whereby and whereunder the plaintiffs sought to have convened a three-judge court pursuant to 28 U.S.C. 2281 and 2284 and the issuance of a preliminary and permanent injunction enjoining the defendant City and County of Honolulu from seeking, and the defendant members of the Public Utilities Commission of the State of Hawaii from rendering a valuation of the physical and tangible property of the plaintiffs pursuant to Act 186, Session Laws of Hawaii, 1921 on the ground that such action would be in violation of the 5th and 14th Amendments to the U.S. Constitution, and the complaint further seeking to have this Court declare pursuant to 28 U.S.C. 2201 that any proceeding initiated by the defendant City and County of Honolulu and entertained by the defendant members of the Public Utilities Commission of the State of Hawaii be in violation of 49 U.S.C. 1602, and the parties having stipulated to dismiss without prejudice all plaintiffs other than the Honolulu Rapid Transit Company, Ltd. and it having been so ordered by this Court, and having heard the oral arguments of the attorneys for the respective parties hereto and having duly considered the memoranda of law submitted by the parties, and being fully advised in the premises, and having thereafter rendered its oral decision on December 24, 1970 followed by a memorandum of decision filed this date containing findings of fact and conclusions of law, it is hereby

Ordered, Adjudged And Decreed, that the Temporary Restraining Order heretofore issued herein be

dissolved as of 9:35 o'clock in the forenoon of December 24, 1970, and it is hereby

Further Ordered, Adjudged And Decreed that the complaint of the plaintiff Honolulu Rapid Transit Company, Ltd. herein be and the same hereby is dismissed with prejudice, and the request for the convening of a three-judge court is hereby denied.

Dated: Honolulu, Hawaii, this 13th day of January, 1971.

/s/ Martin Pence,
United States District Judge.

Approved as to Form:
Peter G. Wheelon for
Howard K. Hoddick, Esq.
Attorney for Plaintiff

Appendix C

SECTION 55 OF THE ORGANIC ACT FOR THE TERRITORY OF HAWAII ACT OF APRIL 30, 1900, CH. 339, §55, 31, STAT. 141; AS AMENDED MAY 27, 1910, CH. 258, §4, 36 STAT. 443

LEGISLATIVE POWER.

Sec. 55. That the legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States locally applicable. The legislature, at its first regular session after the census enumeration shall be ascertained, and from time to time thereafter, shall reapportion the membership in the senate and house of representatives among the senatorial and representative districts on the basis of the population in each of said districts who are citizens of the Territory; but the legislature shall not grant to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise without the approval of Congress; nor shall it grant private charters, but it may by general act permit persons to associate themselves together as bodies corporate for manufacturing, agricultural, and other industrial pursuits, and for conducting the business of insurance, savings banks, banks of discount and deposit (but not of issue), loan, trust, and guaranty associations, for the establishment and conduct of cemeteries, and for the construction and operation of railroads, wagon roads, vessels, and irrigating ditches,

and the colonization and improvement of lands in connection therewith, or for colleges, seminaries, churches, libraries, or any other benevolent, charitable, or scientific association; *Provided,* that no corporation, domestic or foreign, shall acquire and hold real estate in Hawaii in excess of one thousand acres; and all real estate acquired or held by such corporation or association contrary hereto shall be forfeited and escheat to the United States, but existing vested rights in real estate shall not be impaired. No divorce shall be granted by the legislature, nor shall any divorce be granted by the courts of the Territory unless the applicant therefor shall have resided in the Territory for two years next preceding the application, but this provision shall not affect any action pending when this Act takes effect; nor shall any lottery or sale of lottery tickets be allowed; nor shall spirituous or intoxicating liquors be sold except under such regulations and restrictions as the Territorial legislature shall provide; nor shall any public money be appropriated for the support or benefit of any sectarian, denominational, or private school, or any school not under the exclusive control of the government; nor shall the government of the Territory of Hawaii, or any political or municipal corporation or subdivision of the Territory, make any subscription to the capital stock of any incorporated company, or in any manner lend its credit for the use thereof; nor shall any debt be authorized to be contracted by or on behalf of the Territory, or any political or municipal corporation or subdivision thereof, except to pay the interest upon the existing indebtedness, to suppress insurrection, or to provide for the common

defense, except that in addition to any indebtedness created for such purposes the legislature may authorize loans by the Territory, or any such subdivision thereof, for the erection of penal, charitable, and educational institutions, and for public buildings, wharves, roads, harbor, and other public improvements, but the total of such indebtedness incurred in any one year by the Territory or any such subdivision shall not exceed one per centum of the assessed value of the property in the Territory or subdivision, respectively, as shown by the then last assessments for taxation, whether such assessments are made by the Territory or the subdivision or subdivisions, and the total indebtedness of the Territory shall not at any time be extended beyond seven per centum of such assessed value of property in the Territory and the total indebtedness of any such subdivision shall not at any time be extended beyond three per centum of such assessed value of property in the subdivision, but nothing in this Act shall prevent the refunding of any indebtedness at any time; nor shall any such loan be made upon the credit of the public domain or any part thereof; nor shall any bond or other instrument of any such indebtedness be issued unless made payable in not more than thirty years from the date of the issue thereof; nor shall any such bond or indebtedness be issued or incurred until approved by the President of the United States: *Provided,* That the legislature may by general act provide for the condemnation of property for public uses, including the condemnation of rights of way for the transmission of water for irrigation and other purposes.

Appendix D

ACT 186

[S. B. No. 30]

AN ACT TO AMEND AN ACT ENTITLED "AN ACT TO AUTHORIZE AND PROVIDE FOR THE CONSTRUCTION, MAINTENANCE AND OPERATION OF A STREET RAILWAY OR RAILWAYS IN THE DISTRICT OF HONOLULU, ISLAND OF OAHU," ENACTED BY THE LEGISLATURE OF THE REPUBLIC OF HAWAII, JULY SEVENTH, ONE THOUSAND EIGHT HUNDRED NINETY-EIGHT, AND GRANTING A FRANCHISE TO THE HONOLULU RAPID TRANSIT AND LAND COMPANY TO OPERATE A STREET RAILWAY IN THE DISTRICT OF HONOLULU, PROVIDING FOR THE OPERATION OF THE SAME AND PROVIDING FOR THE PURCHASE OF THE SAME BY THE CITY AND COUNTY OF HONOLULU.

Whereas, the legislature of the Republic of Hawaii did, by an Act enacted on the seventh day of July, one thousand eight hundred ninety-eight, authorize Clinton G. Ballentyne and others, their associates and assigns, or such corporation as might be organized by them, to construct, maintain and operate a street railway or railways in the District of Honolulu, Island of Oahu; and

Whereas, pursuant to said Act the said Clinton G. Ballentyne and others did organize a corporation as provided in said Act, under the name of the Honolulu Rapid Transit and Land Company, which, since said date, has been exercising said franchise; and

Whereas, an Act of Congress to provide a government for the Territory of Hawaii, approved April thirtieth, one thousand nine hundred, provided by the 73rd section thereof that said franchise, with others, should be ratified and confirmed, subject to the approval of the President of the United States; and

Whereas, such approval was given by William McKinley, President of the United States, on July twenty-fifth, one thousand nine hundred, to said franchise as then held by said Honolulu Rapid Transit and Land Company; now, therefore,

Be it Enacted by the Legislature of the Territory of Hawaii:

That the Act of the Republic of Hawaii enacted July seventh, one thousand eight hundred ninety-eight, entitled "An Act to Authorize and Provide for the Construction, Maintenance and Operation of a Street Railway or Railways in the District of Honolulu, Island of Oahu", approved by the President of the United States under the authority of an Act to provide a government for the Territory of Hawaii, approved April thirtieth, one thousand nine hundred, ratifying and confirming said franchise, subject to said approval, is hereby amended to read as follows:

"SECTION 1. Definitions. Wherever in this Act the following words occur they shall be held to have the force and meaning herein set forth unless the context clearly indicates otherwise:

"Railway" shall refer to and mean the rolling stock, busses or other vehicles of transportation whether

operated on rails or not, rails, tracks, roadway, with its appurtenances, appliances and connections to be placed in the streets, roads or places in the District of Honolulu on the Island of Oahu, and all land, power stations, houses, buildings, structures and machinery, franchises, and all property of every nature whatsoever owned or acquired, used and useful for public utility purposes as by this Act provided.

"Honolulu" or "District of Honolulu" shall refer to and mean all of that portion of the Island of Oahu included in the judicial, educational and taxation district, now defined by law as the "District of Honolulu" or "Honolulu District."

"Company" shall refer to and mean the Honolulu Rapid Transit and Land Company, and its successors and assigns, the holders of the franchise herein granted.

"Commission" shall refer to and mean the public utilities commission of the Territory of Hawaii, or its successors and any commission of similar character that may be hereafter created by the laws of the Territory of Hawaii.

"Board of Supervisors" shall refer to and mean the board of supervisors of the City and County of Honolulu, or its successsors, or the corresponding legislative body of the successors of said City and County of Honolulu.

"SECTION 2. Grant—operation of street railway and connecting busses or other vehicles authorized. The right is hereby granted to the Honolulu Rapid Transit and Land Company, an Hawaiian corporation, and

to its successors and assigns, for the purpose of transporting passengers, to construct, lay down, maintain and operate a railway, either single or double track, or partly single and partly double, with such curves, switches, turnouts, poles, wires, underground or overhead conduits, and such other appliances and appurtenances as may from time to time be necessary for the use and operation thereof, along and upon such streets, roads, and places in the district of Honolulu, Territory of Hawaii, as are now occupied by the railway of said company, and along and upon such other streets, roads and places in the District of Honolulu, as may, on the application of the company, be approved by the commission after investigation and a public hearing had thereon, or as may be ordered by the commission as hereinafter provided; and in connection with said railway to manufacture, construct, operate, repair and maintain such power stations, houses, buildings, structures and machinery, cars, and all and every other appurtenance or appliance required in the construction, equipment, operation and maintenance of said railway, and to purchase, create, maintain and use such electric and other power as is hereinafter provided for as may be required for the use of such railway, its appurtenances and appliances for the purpose of operating said railway, and in connection with said railway along contemplated extensions thereof or from any point thereof to operate such busses or other vehicles not operated on rails for the transportation of passengers as may be approved or ordered by the commission; provided, however, that the board of supervisors under any law now in exist-

ence or hereafter passed may set aside streets or boulevards upon which no railway shall be subsequently constructed thereon saving and excepting for crossing purposes only.

Freight may be hauled or carried upon said railway upon such streets at such times and in such manner as may be from time to time designated by the board of supervisors.

The company shall have the right to charge, receive and collect for the transportation of passengers and freight, such reasonable rates as may from time to time be fixed and determined by the company with the approval of the commission, or by the commission, so that the same will be sufficient to meet all reasonable costs of operation, including taxes, plus a fair return on the total property of said company actually used for public utility purposes.

"SECTION 3. Power of eminent domain. The company shall have the right, and is hereby vested with the power and authority to acquire by the exercise of the right of eminent domain such real property, rights of way and interest in, over, across, under, and through any real property which may be necessary for the purposes of the company.

The power of eminent domain, granted by this section, shall be exercised in the same manner and with like procedure as the power of eminent domain may be exercised by a railroad company under the provisions of Section 725 of the Revised Laws of Hawaii, 1915, and otherwise in accordance with all applicable provisions of the general laws of the territory, and

only after the company has first obtained the written consent of the commission to the institution of condemnation proceedings, such consent to be given only after investigation by said commission, and notice to the parties in interest and to the public, with an opportunity for said parties and the public to be heard.

"SECTION 4. Motive power. The railway shall be operated by electric power, either through overhead or underground wires or storage batteries, or by internal combustion engines or such other motive power as the company may from time to time adopt, subject to the prior approval of the commission; provided, however, that a part of such railway may be operated by one motive power, while another or other portions thereof may be operated by another or other motive powers, with the prior consent and approval as aforesaid; and provided further, that no steam engine, similar to the steam locomotive commonly in use and no engine, car or other vehicle which emits steam, smoke or offensive odors shall be operated upon the railway on the streets in the District of Honolulu.

"SECTION 5. Construction—equipment. (a) The railway, together with all its branches and connections, shall be thoroughly and substantially constructed and maintained according to the best modern practice, and in such manner as to cause the least obstruction to the free use of the streets, roads and places in which it may be laid.

(b) The cars for carrying passengers shall be of the best modern construction for the comfort, con-

venience and safety of such passengers, and shall be provided with fenders of the best pattern and with proper brakes, lighting and signalling appliances, and with proper numbers, route-boards or signs, all as approved or required by the commission.

(c) The tracks shall not exceed in width four feet, eight and one-half inches between the rails.

(d) The company shall pay all expenses and damages and save the territory and the City and County of Honolulu harmless and indemnified from all loss, cost, damage and expense in consequence of or arising from the construction and operation of said railway, and pay for all repairs to the streets in which the same may be located, made necessary or advisable by the construction or operation of said railway.

The company shall so provide for its electric currents and provide such conductors thereof, and of return currents that avoidable injury or deterioration shall not occur, nor be done to the water pipes, sewer pipes, gas pipes, or other property of the territory, of the City and County of Honolulu, or of any person or corporation, and shall save the territory or the City and County of Honolulu, or any person or corporation, harmless and idemnified from all loss, cost, damage and expense by reason thereof.

(e) The type and style of rail to be employed by the company in constructing and laying down the several railroad tracks, and the manner of laying such rails shall be such as may be approved of or required by the board of supervisors.

(f) In laying down the said tracks not more than one block or in case said block is longer than 1,000 feet not more than 1,000 linear feet of any one street shall be closed to traffic at any one time and the work shall be carried on continuously until completed; provided, however, that a longer distance may be closed with the approval of the board of supervisors.

(g) Trolley wires shall be of a height of not less than 16 feet above the street and shall be provided with proper guard wires. The size and location of such wires, the manner of guarding the same, and the manner of supporting them shall be as approved or required by the board of supervisors; provided, however, that this paragraph shall not operate to deprive the commission of any authority granted under Section 13 hereof.

(h) Every order, requirement, direction or approval of the board of supervisors shall be just and reasonable.

"SECTION 6. Paving obligations. (a) The rights and privileges hereby granted to the company are granted upon such terms, conditions and restrictions as are now or may hereafter be imposed by the laws of the Territory of Hawaii in relation to the matter of constructing and maintaining street railways, and a strict compliance with such laws is hereby required of the company.

(b) The City and County of Honolulu shall have the right to grade, sewer, pave, macadamize or otherwise improve, alter or repair any or all of the streets

or roads upon which said railway is laid or constructed, and such right may not be alienated or impaired; but any work in carrying out and performing such right shall be done in such manner as to obstruct or injure the railway hereby authorized as little as possible. If such work, grade, improvement, alteration or repair upon such streets or roads necessarily interferes with the grade or location of such railway, the company, upon being so ordered by the board of supervisors, shall at its own expense alter said railway and make it correspond with the work, grade improvement, alteration or repair. Such alteration shall be completed within a reasonable time from the date of such order to be fixed by the board of supervisors.

(c) The company, before laying the railway upon any of the streets or roads in the City and County of Honolulu, shall ascertain the lawful grade of such streets or roads from the board of supervisors, and said board shall furnish the required information within a reasonable time. The tracks of the company shall conform to the grades of the streets or roads on which they are laid down as furnished by the board of supervisors, and the company shall not in any way change or alter the same without the written consent of the said board.

The City and County of Honolulu shall have the right to change the lines and grades of its streets or roads at any time whenever required by public convenience, public welfare or public safety; and the

company shall, upon being ordered so to do by the board of supervisors, conform to such new lines or grades by reconstructing its tracks or lines. Such order shall be complied with within a reasonable time from the date thereof to be fixed by the board of supervisors.

The City and County of Honolulu shall reimburse the company for all payments made or expenses incurred by it by reason of such reconstruction when ordered within ten years from the construction of the portion of said railway ordered reconstructed.

(d) The company, in laying its tracks on a street or road already paved or macadamized, shall pave or macadamize the entire space between its tracks, or between the outside rails of double tracks if more than one track be laid, and for one foot outside of the outer rails, and such paving or macadamizing shall be flush with the streets or roads and correspond with the paving or macadamizing of the remaining portion of said street or road, and shall be so laid that the rails shall be flush with the streets or roads, and the company shall keep its tracks and its portions of all the said streets or roads in good repair as required by the board of supervisors; and in like manner said company shall pave or macadamize if its tracks are laid on a street or road not paved or macadamized when said street or road is first paved or macadamized, and likewise shall keep its tracks and its portion of said street or road in good repair as required by the board of supervisors; provided, however, that the

board of supervisors may approve a type or types of paving which will make such railway accessible for repair. Repairs when ordered by the board of supervisors shall be made by the company within a reasonable time from the date of said order to be fixed by said board.

(e) In all cases of street or road improvements by the City and County of Honolulu, the company shall conform to all such improvements in the kind of pavement and manner of laying the same as directed by the board of supervisors.

(f) The location of the railway in the streets or roads shall be as approved by the board of supervisors. If public convenience, public welfare, or public safety requires a change of the location of said tracks, a relocation may be ordered by the board of supervisors. Such relocation shall be made within a reasonable time from the date of said order to be fixed by the board of supervisors.

(g) Should the company fail or neglect to comply with any of the obligations in this section provided after written notice by the board of supervisors of such failure or neglect, or with any order of the board of supervisors made as in this section provided, the board of supervisors may by resolution find the company in default and at any time after five days after written notice of such finding of default shall have been given to the company by delivery of a copy of such resolution at the principal office of the company, the paving, alterations, relocations, repairs, changes

and/or improvements required may be made by the officers, servants, and/or employees of the City and County of Honolulu and the cost thereof recovered from the said company in the courts of the territory.

(h) From every order of the board of supervisors under paragraph (f) of this section except as to initial location, and from any finding of default by said board on account thereof, an appeal shall lie to the commission and every such appeal shall operate as a stay of such order and a stay of any action by the board of supervisors of the City and County of Honolulu under paragraph (g) of this section pending the decision or determination by the commission upon said appeal.

"SECTION 7. Operation. (a) Crossing. Whenever it shall be necessary to cross the tracks of any other railway, the said company is authorized to construct and lay down, at its own expense, proper crossings, removing the rails so crossed for that purpose; but such construction and removal shall be done in such manner as to least interfere with the traffic of such other railway; and after the said crossings are laid, the expense of maintenance shall be borne equally by the company and the owners or lessees of such other railway.

(b) Cars, rolling stock, busses, etc. The company shall at all times maintain a sufficient number of cars, rolling stock, busses or other vehicles of transportation for the carriage of passengers as the commission may approve, require or direct for public convenience,

and such other cars designed for the carriage of parcels and goods as the commission may approve or require.

(c) Speed. The rates of speed of the cars, rolling stock and other vehicles of the company shall be such as from time to time may be approved or required by the board of supervisors.

(d) Rules and regulations. The company shall make just and reasonable regulations regarding the maintenance and operation of said railway on and through said streets and roads. All such rules and regulations shall be subject to the approval of the commission.

(e) Special fares for children. The commission may fix special rates of fare for children under such regulations as it may from time to time make; provided, however, that school children under the age of eighteen years on school days shall be entitled to half fare.

(f) Free transportation. There shall be no free transportation provided, except to officers and employees of the company and members of the Honolulu police and fire departments when on duty and in uniform and such free transportation shall be subject to regulation by the commission.

(g) Passage refused certain persons. The person or persons lawfully in charge of any car, bus or other vehicle of transportation may refuse passage to any person or persons who refuse to pay the lawful fare, or to carry drunk or disorderly persons or persons

affected with infectious or contagious diseases, and may eject therefrom, forcibly if necessary, any such person or persons.

(h) Right of way. The cars lawfully occupying and using the railway shall have the right of way upon the tracks constructed in said streets, roads and places, except that such right shall yield to the police authorities of the said City and County of Honolulu and in case of fire to the apparatus of the fire department of the City and County of Honolulu.

(i) Office in Honolulu—residence of officers. The company shall at all times have and maintain an office for the transaction of the business of the railway at some place in Honolulu convenient of access to the public; and all persons, other than the directors, having charge, management and control thereof and a majority of the directors shall be residents of the City and County of Honolulu, and all of the directors shall be residents of the Territory of Hawaii.

"SECTION 8. Rights to acquire franchises and property of other companies. Subject to the prior approval of the commission as to price, terms and in all other respects, the company shall have the right to take over, either by purchase or lease, all or any part of the property, real and personal, rights, privileges and franchises, of any other railway, or of any power company, or of any company having objects in whole or in part similar to those by this Act authorized, which said property, rights, privileges and franchises are required for the purposes of this Act, and when so acquired shall be held, maintained and operated

under and in accordance with the provisions of this Act.

"SECTION 9. Issue and sale of stock. The company may, with the approval of and under rules and regulations prescribed by the commission, increase its capital stock for capital expenditures by the issuance and sale of new common stock at a price not less than par; provided, however, that bonds or notes the proceeds of which have been used for capital expenditures may be redeemed by capital stock of the company, as approved by the commission, at par to the amount of the proceeds received by the company from the sale of such bonds or notes.

"SECTION 10. Mortgages, bonds, notes and loans. The company, subject to prior approval of the commission, in furtherance of the objects by this Act authorized, shall have the power to and shall, when directed by the commission as hereinafter provided, for the purposes of additions, extensions, increases, betterments and improvements, borrow money and secure the payment thereof with interest by mortgages of all or any portion of its property, which may include the franchise of the company, and for such purpose mortgage bonds may be issued secured by trust deed of such property as aforesaid. Such mortgages or trust deeds may, in addition to the property named above cover also any property or property rights to be acquired after their several dates as well as the income and receipts of the property from whatsoever source derived and may contain such provisions as the commission may deem advisable and

proper for the protection of all concerned, relative to payments of interest and principal, possession and operation of said railway or other property, default, remedies, foreclosures, powers of mortgages or trustees in all matters, and all and every other matter which it may deem wise and proper to insert therein. Provided that nothing in this section contained shall operate to prevent the company from obtaining the usual business credits or from making promissory notes without security.

The commission may authorize the issuance of temporary bonds or notes to provide operating funds and prescribe the terms and rate of interest thereof and also authorize a reserve or sinking fund from earnings for the payment of such bonds, notes or other debt on operating account.

"SECTION 11. Additions, extensions, increases, betterments and improvements. Additions, extensions, increases, betterments and improvements of the railway and the equipment and works connected therewith may be made or acquired by the company, with the approval of the commission and shall be made whenever, after notice and an opportunity to be heard at a public hearing, it shall be directed so to do by the commission, and when so made or acquired, or when made or furnished by others, shall thereafter be maintained by it, except as herein provided; and increases and improvements in the service to be rendered by the company shall likewise be made by it when directed so to do by the commission; provided that the commission shall not so direct unless it shall find

after such hearing that the earnings of the company when maintaining and operating such additions, extensions, increases, and improvements whether of railway or service provided for in this section, together with the remainder of its railway and service and considering a possible increase in rate of fares, will be sufficient to meet all the reasonable costs of operation plus a fair return on the total property of the company including such additions, extensions, increases, betterments and improvements actually used for public utility purposes.

Additions and extensions or improvements made or furnished by others shall not be acquired unless the same shall be transferred to the company, and unless the commission shall upon application therefor and after notice to the company and a public hearing thereon, authorize the same, and unless the construction thereof accords with the general standard of construction of the railway.

If, after any additions, extensions, increases or improvements have been made, it shall appear after a trial for a reasonable period that the earnings of the company, considering a possible increase in rate of fares, will be insufficient to meet all the reasonable costs of operation, plus a fair return on the total property of said company including such additions, extensions, increases, betterments and improvements actually used for public utility purposes, the commission may permit the company to cease the maintenance and operation of the whole or such portion

thereof as may be necessary in order to make such earnings sufficient for such purposes.

The commission may require that any additions, extensions, betterments or improvements be constructed under contract for which public bids shall be called.

Any additions, extensions, betterments, improvements or increases involving capital expenditures made or acquired by the company shall be paid for out of the proceeds of stock, bonds or notes, whichever may be authorized or directed by the commission, and on such terms as shall be authorized by the commission, provided, however, that stock shall be sold for not less than par, and provided further that the commission shall not require the issuance of bonds or notes by the company until the company shall have been given six months time within which to finance such additions, extensions, betterments, improvements, or increases by the sale of capital stock, and further provided that if such bonds or notes are sold for less than par, the discount thereon shall be amortized out of the earnings as an expense of operation in such manner as shall be approved by the commission. If bonds or notes are authorized they may be redeemed in capital stock of the company as approved by the commission at par to the amount of the proceeds received by the company from the sale of such bonds or notes.

"SECTION 12. Annual payment to city and county. The company shall, during the month of January of

each year, pay to the City and County of Honolulu two and one-half per cent (2½%) of its gross income from its railway during the preceding calendar year.

"SECTION 13. Power of commission. The commission is hereby vested with power and jurisdiction by order to regulate, fix and change all rates, fares, charges, classifications, rules and practices made, charged or observed by the company, the manner in which the railway and all other property of the company is operated with reference to the safety or accommodation of the public, its form and method of keeping accounts, books and records, and its accounting system, the return upon its property, the incurring of indebtedness relating to its railway and the disposition of the proceeds thereof and of its railway income, and to regulate all of its financial transactions, its business relations with other persons, companies, or corporations, its compliance with all applicable territorial and federal laws and with the provisions of its franchise and articles of association, its classifications, rules, regulations, practices and service and all matters of every nature affecting the relations and transactions between it and the public and persons or corporations, and to do all things whether herein specifically designated or in addition thereto which are necessary and in the exercise of such power and jurisdiction, all of which as so ordered, regulated, fixed and changed shall be just and reasonable and such as shall provide a fair return on the property of the company actually used for public utility purposes, and such orders may be made after a hearing

upon its own motion or upon complaint. Provided, however, there shall be only one fare in the closely built up portion of the District of Honolulu.

The company shall, if so required by the commission, and under such requirements as the commission shall designate, enter into agreements for mutual transfer privileges, joint track, switching, terminal or other agreements with companies or others carrying on a like business.

Should public convenience, public welfare, or public safety require, the commission may order the company to remove the railway from any street or streets, provided, however, that an alternate location shall be designated by the board of supervisors, and provided further that such removal shall not substantially lessen the income of the company, and provided further that the capital investment lost by such removal shall be replaced from earnings as fixed by the commission over a period not exceeding ten years during which time the value of the company's property for rate making purposes shall not be lessened by reason of such loss, and in event of purchase all of such loss not theretofore so recovered shall be added to and considered as part of the purchase price.

This section shall not be held or construed to be a limitation upon any power of the public utilities commission of the Territory of Hawaii under Chapter 128 of the Revised Laws of Hawaii, 1915, creating a public utilities commission or any amendments thereto or any other laws relating to public utilities within the Territory of Hawaii.

"SECTION 14. Appeal from commission. Every order, decision, approval or direction of the commission made under any of the provisions of this Act shall be made in writing and after notice and hearing and from every order, decision, approval or direction an appeal shall lie to the supreme court of the Territory of Hawaii, in like manner and with like effect as an appeal lies from an order or decision of a circuit judge at chambers. Such appeal shall not of itself stay the operation of the order, decision, approval or direction appealed from, but the supreme court may stay the same, after a hearing upon motion therefor, upon such conditions as it may deem proper.

This section shall not be construed as meaning that the decision of the supreme court of Hawaii shall be final, but either party may appeal in the proper manner from said supreme court in accordance with all general laws now or hereafter enacted relating to appeals in whatever form from the supreme court of Hawaii; provided, however, that no appeal shall lie beyond said supreme court solely upon the ground of construction of a statute of the United States.

"SECTION 15. Penalties. If the company shall violate or neglect or fail in any particular to conform to or to comply with any of the provisions of this Act or any lawful order of the commission or of the board of supervisors, it shall be liable to a penalty of not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000.00) for every such violation, neglect or failure, to be recovered by action brought by either the commission or the board of

supervisors in the name of the territory as the case may be. Any recovery under this section shall be a realization of the commission or the City and County of Honolulu as the case may be.

"SECTION 16. Interfering with operations of railway unlawful. Any person wilfully or maliciously doing any of the following acts, to wit: obstructing the free passage of the cars along the railway; defacing, marring or injuring the posts, wires or other appliances used in operating the railway; defacing, marring or injuring the cars or other property of the company; using the posts, fences, houses or other property of the company without consent for advertising purposes; or in any other manner inflicting injury to the property or causing annoyance and embarrassment in the enjoyment of the property rights or franchise rights of the company, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by fine not exceeding one hundred dollars ($100.00) or by imprisonment not exceeding three months, or by both such fine and imprisonment.

"SECTION 17. Should it become necessary in the prosecution of any public work, or desirable in the public interest, to temporarily stop or suspend operation of cars on any track or line of the company, it may be done on order of the commission and in such case the company shall not be liable for any claim for damages to personal property by reason of the suspension of cars, delay to business or service or otherwise during the period in which said operation is suspended as aforesaid; and the company shall likewise

not be liable if operation is temporarily suspended by act of God or the public enemy, or strikes or accidents.

"SECTION 18. Police power reserved. This Act shall not be construed to limit the Territory of Hawaii in the exercise of its police powers.

"SECTION 19. Forfeiture. Whenever the company refuses, fails or neglects to do, perform, carry out or comply with any Act, matter or thing requisite or required to be done under the provisions of this Act, or any order, direction or regulation of the commission, and shall continue so to refuse, fail or neglect to do, perform, carry out or comply therewith, after due notice by the commission, the commission may have the franchise granted by this Act, and all rights and privileges granted thereunder, forfeited and declared null and void by appropriate proceedings in the nature of quo warranto before the circuit court of the first judicial circuit at law without a jury.

"SECTION 20. Purchase by City and County of Honolulu. City and county authorized to purchase and operate. At any time after authorization therefor by a majority of the registered voters of the City and County of Honolulu voting thereon at an election held in manner and form and under the terms and conditions as may be hereafter provided for by the legislature of Hawaii for this purpose, the City and County of Honolulu, or its successors, may, upon not less than six months' notice in writing to the company, acquire the property of the company used and useful for public utility purposes by paying to it the amount hereinafter provided, and assuming the bonded and all

other debts and liabilities of the company at the date of said purchase.

The amount to be paid to the company for such purchase shall be determined by the public utilities commission; but such amount shall in no case exceed the actual cost of the physical property thereof, or the actual value of the tangible property so purchased; in both cases, less its bonded and all other debts and liabilities. The value of the franchise or good will or any other intangible element shall not be considered in determining the amount to be paid.

The valuation for the purpose of purchase shall be determined by the commission on the request of the board of supervisors prior to the election, provided, however, that such valuation shall be increased or diminished to correspond to the actual physical changes in the property of the company between the date of the valuation and the date of the actual purchase, the same to be determined by the commission.

Either the company or the purchaser may appeal to the supreme court of Hawaii from the decision of the commission by filing a written notice of appeal with the commission within five days after the decision is rendered and served on the company and the City and County of Honolulu. It shall be the duty of the commission immediately to certify up to the supreme court the record of its proceedings showing in such certificate the valuation claimed by the company, the valuation claimed by the purchaser, and the valuation as determined by the commission. Such certificate shall be accompanied by copies of all papers, documents, and

evidences upon which the decision was based and a copy of such decision. Upon such appeal the supreme court may in its behalf take or require further evidence to be introduced by either party.

Within six months after the determination of the purchase price the same shall be paid to the company, and thereupon the franchise granted hereby shall cease and determine, and all the property of the company so valued shall become the property of the purchaser without any further conveyance or assignment; but the company shall make all such further conveyances and assignments as may be desired by the purchaser and approved by the commission or the said court on appeal.

The City and County of Honolulu or its successors, is hereby given the right under the conditions aforesaid to purchase, hold and operate the street railway system or systems so purchased and said city and county and its successors shall have all powers incidental thereto.

The City and County of Honolulu may finance the purchase of the property of said company by issuing bonds secured by said property and said bonds shall be a first charge on the income therefrom. Said bonds may be issued prior to the time of purchase containing provisions that they will become secured as herein specified as of the date of payment of the purchase price but prior thereto shall be a lien upon the general revenues of the city and county. Said city and county may, at its option, make said bonds a lien on both the income of the railway and the general revenues of the

city and county, notwithstanding any limitation as to amount of indebtedness now or hereafter existing and the amount of said bonds shall not be considered to limit the creation of other indebtedness by said city and county as now or hereinafter provided by law. Provided, however, that all revenues derived from time to time from said railway so purchased shall be paid into the treasury of said city and county and there held as a special fund for the following purposes for which alone it shall be expended:

1. The operation and maintenance of said railway.

2. Interest on the bonds issued for such purchase and bonded or other indebtedness of the company assumed by the City and County of Honolulu at the time of such purchase.

3. A sinking fund for the payment of said bonds and said assumed bonds and said other indebtedness for which purpose there shall be set aside each year not less than such a sum that the aggregate of the sums so set aside with interest thereon compounded annually at the rate of interest specified in the said bonds and said other indebtedness would amount to the par value of the said bonds and said other indebtedness at maturity nor more than such a sum that the aggregate of such sums with such interest would amount to the par value of the said bonds or said other indebtedness when redeemable.

4. The extension and improvement of said railway.

"SECTION 21. Amendment, alterations or repeal. This Act may be amended or altered in whole or in

part or repealed by the legislature of the Territory of Hawaii with the approval of Congress.

"SECTION 22. Effective date. This Act shall take effect when the company shall notify the Governor of the Territory of Hawaii in writing that it has accepted the terms hereof by an affirmative vote of the holders of two-thirds of the issued capital stock, provided such notice is so given within six months after the approval of this Act by Congress, otherwise this Act shall become null and void; such approval of Congress to be secured within two years from the approval of this Act by the Governor of the Territory of Hawaii."

Approved this 26th day of April, A. D. 1921.

C. J. McCarthy,
Governor of the Territory of Hawaii.

Appendix E

ACT OF AUGUST 24, 1921, CH. 81, 42 STAT. 185

Chap. 81.—An Act Ratifying, confirming, and approving certain acts of the Legislature of Hawaii granting franchises for the manufacture, distribution, and supply of gas, electric light and power, and the construction, maintenance, and operation of a street railway, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act of the Legislature of Hawaii (Act 134 of the Session Laws of 1917), entitled "An act to authorize and provide for the manufacture, maintenance, distribution, and supply of electric current for light and power within the district of Hamakua, on the island and county of Hawaii, Territory of Hawaii," approved by the governor of the Territory of Hawaii April 30, anno Domini 1917, as amended; the act of the Legislature of Hawaii (Act 135 of the Session Laws of 1919), entitled "An act to authorize and provide for the manufacture, maintenance, distribution, and supply of electric current for light and power within the district of Hana, on the island and county of Maui, Territory of Hawaii," approved by the governor of the Territory of Hawaii on April 25, anno Domini 1919; the act of the Legislature of Hawaii (Act 101 of the Session Laws of 1921), entitled "An act to authorize and provide for the manufacture, maintenance, distribution, and supply of electric current for light and power within the districts of North

and South Hilo and Puna, in the county of Hawaii, Territory of Hawaii," approved by the governor of the Territory of Hawaii on April 16, anno Domini 1921; the act of the Legislature of the Territory of Hawaii (Act 105 of the Session Laws of 1921), entitled "An act to authorize and provide for the manufacture, maintenance, distribution, and supply of electric current for light and power within Kappa and Waipouli, in the district of Kawaihau, on the island and county of Kauai, Territory of Hawaii," approved by the governor of the Territory of Hawaii on April 16, anno Domini 1921; the act of the Legislature of the Territory of Hawaii (Act 184 of the Session Laws of 1921), entitled "An act granting a franchise for the purpose of manufacturing and supplying gas and electric current in the districts of Wailuku and Makawao, county of Maui, Territory of Hawaii," approved by the governor of the Territory of Hawaii on April 26, anno Domini 1921; and the act of the Legislature of the Territory of Hawaii (Act 186 of the Session Laws of 1921), entitled "An act to amend an act entitled 'An act to authorize and provide for the construction, maintenance, and operation of a street railway or railways in the district of Honolulu, Island of Oahu,' enacted by the Legislature of the Republic of Hawaii July 7, 1898, and granting a franchise to the Honolulu Rapid Transit and Land Company to operate a street railway in the district of Honolulu, providing for the operation of the same, and providing for the purchase of the same by the city and county of Honolulu,' approved by the governor of the Territory of Hawaii on

April 26, anno Domini 1921, are hereby ratified, confirmed, and approved.

Sec. 2. That Congress, or the Legislature of the Territory of Hawaii may at any time alter, amend, or repeal any or all of the above acts.

Approved, August 24, 1921.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 72-31

HONOLULU RAPID TRANSIT COMPANY, LIMITED,
Petitioner,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF HAWAII, and THE CITY AND COUNTY OF HONOLULU,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT PUBLIC UTILITIES COMMISSION OF THE STATE OF HAWAII IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (Appendix B of the Petition) has not yet been reported. The opinion of the Court of Appeals for the Ninth Circuit (Appendix A of the Petition) has not yet been reported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Does a State, in the grant of a utility franchise, violate the Fifth and Fourteenth Amendments of the United States Constitution when it includes a term which authorizes a county at some future date to purchase the franchisee's properties used and useful for utility purposes at a price which is less than fair market value?

STATUTES INVOLVED

The relevant part of Section 20 of Petitioner's franchise (Act 186, Session Laws of Hawaii 1921) is quoted below. Petitioner's franchise is set forth in toto in Appendix D of the Petition.

> "SECTION 20. Purchase by City and County of Honolulu. City and county authorized to purchase and operate. At any time after authorization therefor by a majority of the registered voters of the City and County of Honolulu voting thereon at an election held in manner and form and under the terms and conditions as may be hereafter provided for by the legislature of Hawaii for this purpose, the City and County of Honolulu, or its successors, may, upon not less than six months' notice in writing to the company, acquire the property of the company used and useful for public utility purposes by paying

to it the amount hereinafter provided, and assuming the bonded and all other debts and liabilities of the company at the date of said purchase.

"The amount to be paid to the company for such purchase shall be determined by the public utilities commission; but such amount shall in no case exceed the actual cost of the physical property thereof, or the actual value of the tangible property so purchased; in both cases, less its bonded and all other debts and liabilities. The value of the franchise or good will or any other intangible element shall not be considered in determining the amount to be paid.

"The valuation for the purpose of purchase shall be determined by the commission on the request of the board of supervisors prior to the election, provided, however, that such valuation shall be increased or diminished to correspond to the actual physical changes in the property of the company between the date of the valuation and the date of the actual purchase, the same to be determined by the commission.

"Either the company or the purchaser may appeal to the supreme court of Hawaii from the decision of the commission by filing a written notice of appeal with the commission within five days after the decision is rendered and served on the company and the City and County of Honolulu. It shall be the duty of the commission immediately to certify up to the supreme court the record of its proceedings showing in such certificate the valuation claimed by the company, the valuation claimed by the purchaser, and the

valuation as determined by the commission. Such certificate shall be accompanied by copies of all papers, documents, and evidences upon which the decision was based and a copy of such decision. Upon such appeal the supreme court may in its behalf take or require further evidence to be introduced by either party.

"Within six months after the determination of the purchase price the same shall be paid to the company, and thereupon the franchise granted hereby shall cease and determine, and all the property of the company so valued shall become the property of the purchaser without any further conveyance or assignment; but the company shall make all such further conveyances and assignments as may be desired by the purchaser and approved by the commission or the said court on appeal.

"The City and County of Honolulu or its successors, is hereby given the right under the conditions aforesaid to purchase, hold and operate the street railway system or systems so purchased and said city and county and its successors shall have all powers incidental thereto. . . ."[1]

STATEMENT OF THE CASE

Petitioner omitted, as required by Rule 23(g) of this Court's Rules, to cite the "basis for federal jurisdiction in the court of first instance." The jurisdic-

[1]Act 300, S.L.H. 1967, amended the first paragraph of Section 20 by deleting the requirement of a referendum and providing six months' notice to the Petitioner. Instead, an ordinance authorizing the acquisition had to be enacted by the City Council. All other matters in Section 20 remained the same.

tion of the District Court was invoked by Petitioner under the following authorities:

28 U.S.C. §§1343(3) and (4);
42 U.S.C. §1983;
28 U.S.C. §1331;
28 U.S.C. §§2201 and 2202;
28 U.S.C. §§2281 and 2284;
49 U.S.C. §§1601 et seq.;
42 U.S.C. §3072

and the Fifth and Fourteenth Amendments of the United States Constitution (Cl.R. 3). The District Court based its jurisdiction on the federal question presented and where the amount in controversy exceeded $10,000.00. (28 U.S.C. §1331 (Cl.R. 449)

Petitioner's Statement of the Case is adequately set forth in the Petition. However, Respondent Public Utilities Commission, Department of Regulatory Agencies, State of Hawaii, hereinafter "PUC", disagrees with Petitioner's statement as to the basis for the District Court's dismissal of the case wherein it stated on page 6 of the Petition:

> "The District Court dismissed the action, holding that a government body could include in the grant of a statutory franchise any provision it wished—including one for the taking of private property for public use without the payment of just compensation (Cl.R. 450-453)."

The District Court in its memorandum decision never stated that the acquisition by the City was a "taking." *In fact* the District Court held "that the

acquisition of HRT property under the franchise is *not a condemnation situation, but as in Janes v. The City of Racine* [143 N.W. 707 (1913)] *all that is before this Court at this time is the fact that the City wants to purchase HRT property under the terms and conditions of the franchise contract made in 1921; a contract that HRT has become unhappy with.*" (Emphasis added.) (Cl.A. 452)

ARGUMENT

Respondent PUC adopts and reiterates for its Argument portions of the District Court's decision, a decision that was succinct and penetrating in its analysis:

> "HRT voluntarily, with its eyes open and uncoerced, accepted this franchise in 1921. Indeed the internal communications of the company, submitted as an exhibit by HRT, leads this court to the conclusion that HRT deliberately sought in substantially the same form the very franchise which was subsequently enacted. It did so on the firm belief that such an open end franchise was to their advantage, and they were perfectly willing to accept the terms regarding purchase when and if that should ever come about. Consequently, this court finds the *Frost* case, relied on by the Plaintiff as authority for the proposition that an individual or corporation cannot be forced by a state to waive a constitutional right in exchange for the grant by the State of a privilege, to be inapplicable here." (Cl.R. 451)
>
> * * *

"When one recognizes that HRT worked for the very contract that it now attacks, then the claimed unconstitutionality of Section 20 of the Franchise as a deprivation of its constitutional right reaches the point of frivolity in the face of the cases on this very problem. As this court has said, the cases are clear that the grant of a franchise by a subdivision of the State, or the State itself, and its acceptance by the grantee constitutes a contract. Since this proposition has been clearly and finally settled by the decisions of the courts of nearly every state of the union and the Supreme Court of the United States, the federal question raised by Plaintiff's complaint is very slight indeed when all the facts are before the Court. Thus, this Court finds that HRT, having gone into the contract with open eyes, and open ears, and open arms is bound by the terms thereof." (Cl.R. 453)

I.

THE DECISION BELOW IS CLEARLY CORRECT

Since *Dartmouth College v. Woodward,* 4 Wheat. (U.S.) 518 (1819), it has been a cardinal rule of law that a franchise is a contract between the grantor and the grantee. See also *Territory v. Fung,* 34 Haw. 52, 61 (1936). To have a contract, there must be an acceptance and performance under the terms of the franchise. *New Orleans Water-works Co. v. Rivers,* 115 U.S. 674 (1885); *Louisville Gas Co. v. Citizens' Gas Co.,* 115 U.S. 683 (1885). The record indicates that HRT accepted the franchise (Cl.R. 31 n. 13, 43)

and has been operating under said franchise for fifty years.

HRT alleges that:

> *"The record shows that the government adopted the franchise and presented it to HRT on a take it or leave it basis.* There was no negotiating or bidding as would occur when a government contract is let or an eminent domain lawsuit is settled. *Apparently, HRT should have stuck to its rights under the old franchise, rejected the new franchise, and let the public be damned."* (Emphasis added.)

But the record is totally and completely otherwise. The record indicates that HRT was offered a new franchise by the Territorial Legislature in 1921, 7½ or 8½ years prior to the termination of their existing franchise. (Cl.R. 49) After Congress approved the franchise HRT had six months in which to notify the Governor of the Territory of its acceptance or rejection. (Cl.R. 49, 64)

For nearly six months HRT carefully analyzed and reviewed its options (Cl.R. 48-58) and finally transmitted its letter of acceptance to the Governor one day prior to the end of the six-month period (Cl.R. 49, 64, 31). The record also indicates that a special committee of the HRT directors made a comprehensive study of its alternative courses of action and presented same to its directors and stockholders—the report however is absolutely silent on the subject of the option given to the City to *purchase* the HRT assets. (Cl.R. 48-59)

The report of the special committee of the HRT board of directors is *very significant,* however, in that the report indicates that *the form of Act 186 was approved by the company.* (Cl.R. 49) When Act 186 was submitted to Congress, Congress approved Act 186 but eliminated the provision that the Territorial Legislature needed its approval for amendment or repeal of the franchise. (Cl.R. 49) This deletion caused grave concern to HRT since the directors' report places heavy emphasis on the fact that the franchise may be repealed solely by the Territorial Legislature *without compensation* and that HRT may be left with "junk value". (Cl.R. 54) Nevertheless, the directors' report indicates that since the Company "consented to the clause permitting repeal without purchase, provided the Legislature and Congress both approved" it was in no position to argue with the consent it had given to the form of the franchise to the Legislature since the only change made by Congress was that the Territorial Legislature could repeal or amend the franchise without Congressional approval. It appears reasonable from the foregoing to argue that if HRT tried to insert a *purchase provision* into the franchise in the case of a repeal, it must have inserted or agreed to the purchase provision (Section 20 of the franchise) in the event the City decided to undertake the HRT transit operation. This conclusion is inescapable since HRT approved the form of Act 186. (Cl.R. 49)

Notwithstanding the fact that HRT was *completely* aware of all of the terms of the franchise (Cl.R. 48-

58) and *agreed* to the form and content of said franchise (Cl.R. 49) and without question had a more than substantial hand in drafting Act 186, it alleges today that the acquisition by the City is a confiscatory act. It relies, in substance, on the doctrine enunciated in *Frost Trucking Co. v. R.R. Comm.*, 271 U.S. 583 (1926), wherein the Court held that though a state may have the power, in certain instances, to deny a privilege altogether and may grant such privilege upon certain conditions—it may not impose conditions which require relinquishment of constitutional rights. (pp. 593-594)

The District Court and Court of Appeals for the Ninth Circuit held that the principle enunciated in the *Frost* case, based on all of the facts before the Court, to be inapplicable to HRT's case. (Cl.R. 451; p. 4 of Appendix A of Petition)

In *Portland General Electric Co. v. Federal Power Com'n*, 328 F.2d 165 (9th Cir. 1964), the issue raised was whether there was a taking without due process of law when the government required as a condition to granting a license to construct improvements on navigable rivers under the Federal Power Act, that the licensee convey, free of cost, such lands and rights-of-way the government may someday require for the purpose of constructing navigation facilities. The Court held that there was no taking:

> "This is not true because petitioners are not required to accept the tendered license. Any license rights which petitioners ever had to construct and maintain these project works expired

> in 1954. . . . In applying for a major license effective as of 1955, petitioners seek rights they do not now have. In order to gain those rights they must accept the license upon such terms as Congress has determined should be imposed in the public interest. (citations omitted) ***It is not a taking for the Government to withhold a benefit it is not contractually or constitutionally obliged to confer.*** Nor is it a taking for the Government to impose financial obligations upon the recipient of a benefit, if, as here, the benefit may be declined." (Emphasis added.) (p. 173.)

In *United States v. Appalachian Power Co.*, 311 U.S. 377, 427-428 (1940), the Court upheld the right of the government under the Federal Power Act to insert a statutory condition in the award of a license that enables the government, at the expiration of the license, to purchase the power plant at a "net investment" price which is conceded to be less than fair market value. The Court cited on the issue of "confiscation", the case of *Fox River Co. v. R.R. Comm.*, 274 U.S. 651 (1927), as being "decisive". The right of the government to purchase the power plant at less than market value was the price which the person paid to obtain the special privilege from the government.

To the same effect:

Albrecht v. United States, 329 U.S. 599 (1947).

Further, as reasoned by the Court of Appeals for the Ninth Circuit:

> "HRT's contentions, if valid, would gravely prejudice if not destroy the power of government

to utilize options to acquire property, through making it impossible for the seller to commit himself to a sale price. Hindsight would always be available to compel price adjustments on the theory that the price no longer constituted just compensation.

"An exchange of economic benefits such as this franchise represents underlies every commercial contract and the Supreme Court has left no doubt that the Federal government enjoys power to conclude commercial bargains. Further, it may employ the remedies available to private citizens in enforcing a contract. *Rex Trailer Co. v. United States,* 350 U.S. 148 (1956); *Perkins v. Lukens Steel Co.,* 310 U.S. 133 (1940). The states enjoy a parallel power, *United States v. Bekins,* 304 U.S. 27 (1938). The doctrine of unconstitutional conditions does not strip state and federal governments of this indispensable and long acknowledged power." (p. 5 of Appendix A of Petition.)

The cases are clear that franchise terms which create a duty or burden on the franchisee or grants a benefit to the government will be enforced against the franchisee since the acceptance of those terms was the price which the franchisee paid to obtain the special privilege that the State or municipality granted. HRT had no vested or inalienable right to demand a franchise nor was the State contractually or constitutionally bound to grant HRT a new franchise after the expiration of its original grant. The terms of the 1921 franchise were clear and if HRT did not care for the bargain, it could have refused. HRT, however, with eyes and ears open to the opportunity to

make "more lucrative profits" (Cl.R. 452) for the future, accepted the franchise. The acceptance and performance of its part of the bargain sealed the contract.

II.

THERE IS NO CONFLICT OF DECISION

Petitioner asserts that in the instant case the Ninth Circuit decision is in conflict with decisions of the Fifth and Eighth Circuits, but a review of the facts and holdings of each case cited clearly indicates that the cases are not applicable or in conflict with the holding in the instant case.

In *United Gas Pipeline Company v. Terrebonne Parish Police Jury,* 445 F.2d 301 (1971, 5th Cir.) aff'g 319 F.Supp. 1138 (E.D.La. 1970), the plaintiff, United Gas Pipeline Company, sought a building permit from the Terrebonne Parish to construct its interstate pipeline under the Parish's right-of-way. In order to obtain the permit, United had to comply with an Ordinance No. 1682 which related to certain technical engineering requirements for pipeline construction and safety and for the removal, raising and lowering of Permittee's pipeline resulting from a Parish public project. A further condition precedent was added that "if said proposed pipeline or any portion thereof interferes with any future public improvement in said parish, it, United, will alter, relocate, or remove, at United's sole expense, the pipeline on that portion of the land covered and affected by the aforesaid right-of-way and servitude which United purchased from the South Coast Corporation *which is*

not under the road." (Emphasis added.) 319 F.Supp. p. 1143.

United protested to the *additional* condition precedent imposed for the building permit and to the constitutionality of Ordinance No. 1682 on several grounds.

The trial Court held that the imposition of the additional condition to have United alter, relocate or remove its property which is not under the Parish's road at its own expense amounted to a taking of United's property without the payment of just compensation in violation of the due process clause of the Fourteenth Amendment. The Court cited the *Frost* case, *supra,* as one of its authorities. The Court also held that Ordinance No. 1682 was unconstitutional in that the Federal government had exclusive jurisdiction and had wholly pre-empted the subject matter.

A critical reading of the facts of the case, however, clearly demonstrates that the trial Court held that there was a "taking" of United's property only because the Parish was "taking" property belonging to United which was on United's *private* easement which it purchased from a third party and was in no way connected to Terrebonne Parish's right-of-way. There is nothing in the decision to indicate that there would have been a "taking" if the condition to alter, remove or relocate its pipeline as a result of county improvements were *within* Terrebonne Parish's right-of-way. Ordinance No. 1682, in fact, had a provision requiring this act of the Permittee.

The Fifth Circuit reiterated this position when it stated:

> "In this cause we agree with the judgment and conclusion of the District Court, 319 F.Supp. 1138, that Terrebonne Parish Police Jury cannot require, as a condition to the issuance of a construction permit to construct, maintain and operate an interstate gas transmission pipeline under a public road within the Parish, that the gas pipe line compainy pay the cost of relocating, altering or removing pipelines of the Gas Pipe Line Company (appellee) *outside of the highway or road right-of-way. . . .*" (Emphasis added.)

The decision was clarified further and served clear notice that it was possible to have United remove, alter and relocate its pipeline *within* the right-of-way when the Court stated on p. 302 the following:

> "We do not hold that the Parish Police Jury cannot enact a valid ordinance requiring permits with reasonable conditions."

Since Ordinance No. 1682 was struck down as being unconstitutional, it served to indicate that an ordinance could be enacted which included reasonable conditions, e.g., removal of pipeline within the Parish's right-of-way.

In the instant case, the purchase of HRT's properties is limited to properties "used and useful for utility purposes" and no other. The properties being purchased are part and parcel of a utility operation, which properties HRT agreed to sell when it accepted the franchise.

We submit that the Ninth Circuit decision is not contra to the *Terrebonne Parish* case since Section 20 of the franchise in the instant case does not purport to purchase any property not "used and useful for utility purposes."[2] No condition precedent was imposed on Petitioner to sell any properties not used and useful for transit operations at the time the franchise was being offered to Petitioner. We further submit that the *Terrebonne* case supports Respondent PUC's franchise in that the Fifth Circuit indicated that reasonable conditions may be imposed in the granting of a permit. The authorities herein cited support the proposition that the purchase of properties at less than fair market value is a reasonable condition to include in a franchise or a permit.

Petitioner cites *Midwest Video Corporation v. United States,* 441 F.2d 1322 (8th Cir. 1971), rev'd, 40 U.S.L.W. 4626 (U.S. June 7, 1972) to indicate another Court of Appeals decision to be in conflict with the Ninth Circuit decision in the instant case. Petitioner being in error with respect to the holding of the Eighth Circuit in the *Midwest Video* case is also in error when it states that said decision is in conflict with the instant case. Petitioner alleges that in the *Midwest Video* decision by the Eighth Circuit, the cablecasting rule as it applies to existing operations with 3,500 or more subscribers, was struck down on the authority of the *Frost* case. This is error since

[2]A stipulation was entered into between HRT and the City and County of Honolulu and PUC that only those properties belonging to HRT would be acquired under Section 20 of the franchise. (Cl.R. 443-444)

the basis for the Eighth Circuit ruling was that the FCC was *without authority* to impose a program originating rule under existing statute and case law.[3] The Court reviewed the Communications Act of 1934 and case authorities such as *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1918) and *Fortnightly Corp. v. United Artists Television Inc.*, 392 U.S. 390 (1968) to make a determination as to what powers the FCC had, absent legislation, in its regulation of the CATV industry. Upon review of said Act and cases, the Court held the FCC did not have the authority to require cablecasting.

The *Frost* case was cited only for the proposition that there *may* be confiscation of property of existing CATV operators due to high start-up costs of program origination resulting in forcing certain operators out of business. This Court, however, met the issue of confiscation of property squarely and disposed of same when it cited in its reversal of *Midwest Video Corp.*, 40 U.S.L.W., pp. 4633-4634, at footnote 31, a portion of Judge Tuttle's decision in *General Telephone Co. of Southwest v. United States*, 449 F. 2d 846, 863-864 (CA 5, 1971) which stated in part:

> ". . . The property of regulated industries is held subject to such limitations as may reasonably be imposed upon it in the public interest and the courts have frequently recognized that

[3]The Court held on page 1328 the following:

"We hold that the Federal Communications Commission is without authority to impose the program originating rule on existing cable television operators." The *Frost* case was not cited for this holding.

> new rules may abolish or modify pre-existing interests . . ."

Further, the Eighth Circuit held that confiscation would take place *only* as to existing operators. For those operators who volunteer the cablecast, the Court stated:

> "We pretermit consideration of the validity of the rates promulgated with respect to CATV operators who voluntarily elect to cablecast." (p. 1328)

It is reasonable to assume from the foregoing determination that a person who volunteers to cablecast would not have standing to attack the cablecasting rule nor would there be any confiscation.

Respondent PUC submits that in the instant case, the State of Hawaii did not change the original terms of the franchise agreed to by Petitioner in 1921. No new rule or legislation amends the purchase price agreed to by Petitioner which has been in existence for over fifty years. The then Territorial Legislature, with the approval of the United States Congress, enacted legislation granting a franchise to Petitioner which was in the public interest. It further included a provision granting an option to the City and County of Honolulu to purchase Petitioner's properties that were used and useful for utility purposes at some future date as being a reasonable ancillary condition with the award of the franchise. Under said facts, there is no confiscation of property as the District and the Circuit Court of Appeals have held. The City is merely exercising an option granted to it by the

State and *voluntarily approved* by Petitioner in 1921. We submit that the *Midwest Video* decision by the Eighth Circuit which was reversed by this Court is not applicable or in conflict with the holding made by the Ninth Circuit in the instant case. We further submit that this Court disposed of the issue of confiscation in *Midwest Video* when it cited *General Telephone Company of the Southwest* case, *supra.*

III.

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW

Throughout the proceedings in the District Court and the Court of Appeals in this cause, Petitioner has constantly reiterated its position that the purchase price for the properties used and useful for utility purposes agreed to by Petitioner was offered on a "take it or leave it" basis or Petitioner was faced with a "rock or whirlpool" situation as enunciated in the *Frost* case. However, the report of Petitioner's directors to its stockholders in 1921 (Cl.R. 48-58) clearly demonstrate that there was no coercion, exaction or a "take it or leave it" condition made by the State. Both the District Court and the Court of Appeals found that the acceptance of the franchise by Petitioner in 1921 was "an act of free choice." (Cl. R. 452; p. 6, Appendix A of Petition) Where there has been no coercion or exaction, and the record amply demonstrates this fact, all that remains is a contract term whereby the Petitioner agreed to sell to the County its properties used and useful for utility

purposes at some future date. That day has arrived and the City and County of Honolulu is exercising its option granted to it by the State to *purchase* Petitioner's properties. There is no dispute that a State may enforce a contract term the same as any other private person. *United States v. Bekins,* 304 U.S. 27 (1938). On the issue of confiscation, the *Portland General Electric, Appalachian Power, Fox River Co.,* and *Albrecht* cases have held, under facts similar to the instant case, that there is no "taking" in violation of the Fifth Amendment or Fourteenth Amendment involved.

We submit that Petitioner has presented no important question of federal law for this Court to decide, and we further submit that the authorities cited by the District Court and the Court of Appeals for the Ninth Circuit in this cause are "decisive" on the issues raised.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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Public Utilities Commission
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August 11, 1972.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 72-31

HONOLULU RAPID TRANSIT COMPANY, LIMITED,
Petitioner,

VS.

PUBLIC UTILITIES COMMISSION OF THE STATE OF HAWAII, and THE CITY AND COUNTY OF HONOLULU,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT CITY AND COUNTY OF HONOLULU IN OPPOSITION

The respondent City and County of Honolulu (City) respectfully prays that the Petition of the Honolulu Rapid Transit Company, Limited (HRT) for a writ of certiorari be denied.

QUESTION PRESENTED

Whether the purchase of a privately-owned, public utility property, pursuant to the terms of a contract between the government and the utility at a price which is lower than that ordinarily obtainable under eminent domain, is a taking of private property without the payment of just compensation.

STATEMENT OF THE CASE

The City generally agrees with HRT's summary of the historical background of the case. However, HRT neglects to mention that Act 186, S.L.H. 1921 ". . . was the subject of extended hearings, at which hearings representatives of the municipality, the company, and the public attended . . ." (R. 243 and 246).

Moreover, the record also shows that the bill as passed "met with the approval of the Honolulu Rapid Transit and Land Company, Public Utilities Commission, City and County of Honolulu, and was the result of compromise had between all parties in interest after innumerable meetings and hearings; . . ." (R. 244; 48-58).

Consequently there is no support in the record for HRT's assertion on page 4 of its Brief that a provision authorizing the acquisition of HRT's property without the payment of just compensation was added by the Hawaii Senate Judiciary Committee, by which HRT apparently means that no such provision was considered earlier. Therefore, the City has attached as Appendices A and B to this Brief the report of

the Senate Judiciary Committee Eleventh Legislature, Regular Session 1921 (pp. 336-337, Senate Journal 1921) and Senate Bill 30 in the form approved by the Public Utilities Commission introduced during that session and later to become Act 186. Senate Bill 30 provides in Section 24 of the proposed franchise that the City could ". . . acquire the property of the Company by paying to it cash equal to the par value of its outstanding capital stock . . ." (Appx. p. viii) in HRT's reply brief before the Supreme Court of the State of Hawaii in its appeal from the decision of the Public Utilities Commission on the valuation of the physical and tangible property of the Company pursuant to Section 20, HRT attached the decision of the Public Utilities Commission dated September 19, 1924 as an exhibit. That decision is set forth in part in Appendix C of this Brief. According to that decision HRT filed a petition for an increase in the rates of the fare wherein it stated,

> "3. That the fair value of the property of the company actually used for public utility purposes is not less than the sum of three million dollars ($3,000,000), and the par value of its authorized, issued and outstanding capital stock is the sum of two million five hundred thousand dollars ($2,500,000)." (Appx. p. xiii).

These public records clearly show that the early drafts of the franchise, which had the full support of HRT, provided for the purchase of the HRT property at a price which was less than that to which it would be entitled to under eminent domain. The Senate Judiciary Committee, then, did nothing more

than change the formula by which the value of the property to be purchased by the City would be determined. Under either method of valuation elements such as appreciation in value of the real estate, which is what HRT is principally concerned with here, or going concern value would not have been allowed.

The City considers this point worth mentioning because, as the record plainly shows, HRT has throughout the proceedings in the lower courts attempted to characterize the franchise as a taking of its property. The City and the courts below on the other hand have relied on the principal that the franchise is nothing more than a contract which HRT not only willingly entered into but had a hand in drafting. In view of the authorities discussed later in this brief, HRT's willing acceptance of the franchise is enough by itself to form a valid contract whose terms are binding on the Petitioner. But the very fact that HRT participated in the drafting of the franchise certainly precludes any possibility that the Company was forced to waive a constitutional right.

ARGUMENT

I

THE DECISIONS BELOW WERE CLEARLY CORRECT

a. The decisions below were in complete accord with the decisions of this Court

In rejecting HRT's claim the Courts below relied upon the well established principle set forth in numerous decisions of this Court that a franchise is a

contract between the grantor and the grantee. The trustees of *Dartmouth College v. Woodward,* 4 Wheat. U.S. 518, 656 (1819); *Grand Trunk Western Railroad Company v. South Bend,* 227 U.S. 544, 552 (1913); *Stone v. Mississippi,* 101 U.S. 814, 816 (1880). The consideration for the grant of a franchise has been held to be the obligation of the grantee to be bound by the terms and conditions thereof, *Central Transportation Company v. Pullman Palace Can Co.,* 139 U.S. 24, 43 (1891), or as expressed by some authorities, it may be the benefit to the community. *Dartmouth College v. Woodward, supra,* at 637. As in other contracts, a franchise may contain such terms and conditions as the grantor deems fit which when accepted by the grantee become part of the contract, *Southern Pacific Co. v. Portland,* 227 U.S. 559, 572 (1913); *New Orleans Water Works Co. v. Rivers,* 115 U.S. 674, 680-681 (1885), and it makes no difference that the grantor is powerless to impose the obligations of the franchise under its general legislative powers, *Southern Pacific Co. v. Portland, supra,* at 571, 572. It is basic to the law of contracts that for a contract to be valid and enforceable it must be supported by a consideration. *Tilley v. City of Chicago and County of Cook,* 103 U.S. 155, 161 (1881); Williston, *Contracts* (3rd Ed. 1957) Sec. 107. Consideration is said to be the "price" bargained and paid for a promise. Consideration is present if there is a forbearance to assert a legal right, *Graphic Arts Fashion Inc. v. Boston Redevelopment Authority,* 255 N.E.2d 793, 795 (1970) or the relinquishment of a property right;

Hetrick v. Ashburn, 86 Ind.App. 496, 142 N.E. 386, 387 (1924). In exchange for the franchise grant HRT bargained away its right to the compensation it would have been entitled to under the Fifth and Fourteenth Amendments to the U.S. Constitution. HRT has cited no authority that such a bargain is for any reason invalid or against public policy. Indeed there is no such authority for there is no doubt that constitutional rights for the benefit or protection of an individual may be waived, *Johnson v. Zerbst,* 304 U.S. 458, 464, 465 (1938).

It is also fundamental to the law of contracts that there must be an acceptance of the offer. *Tilley v. City of Chicago and County of Cook, supra,* at 161; *C. Iber and Sons, Inc. v. Hermit,* 108 Ill.App.2d 443, 248 N.E.2d 131, 133-134 (1969); Williston, *Contracts* (3rd Ed. 1957) Sec. 64. The franchise specifically provides in Section 22 that it would not become effective until *accepted* by HRT. Thus the franchise presented to HRT was an offer which the Company could either accept or reject. Upon the recommendation of its directors (R. 57) the offer was accepted (R. 43). The purchase provisions of Section 20 of the franchise then, are merely part of the price HRT was willing to pay in 1921 for the valuable franchise grant, a grant which has enabled the Company to prosper, and in the words of its counsel ". . . become a dynamic operating and investment company". (R. 46) In having accepted the franchise HRT has taken advantage of a privilege enjoyed by no other citizen. In exchange for this privilege HRT, presumably with a due

regard for its own best interests, bargained away its right to just compensation in the eminent domain sense by giving the City an option to purchase its property at less than fair market value. The Territory acquired for the City the right to purchase the property of HRT, in the event that should become necessary, at a price which would not reflect any increase in the value of the property of the Company by reason of its protected petition under the franchise but would nevertheless permit the shareholders to recover their investment in the event the property declined in value.

b. Reliance on the decision in Frost & Frost Trucking Co. v. Railroad Commission, 271 U.S. 583 (1926) is misplaced.

HRT in arguing that Section 20 of the franchise is unconstitutional because it deprives HRT of its property without the payment of just compensation in the eminent domain sense overlooks the well settled legal principle that its franchise is a contract, and instead places heavy reliance on the doctrine of unconstitutional conditions set forth in the case of *Frost & Frost Trucking Co. v. Railroad Commission, supra,* at 593, 594. HRT is seeking to repudiate its part of the contract by now arguing that it was forced to waive its constitutional right to just compensation. In its petition for certiorari to this Court, HRT contends that its franchise was in reality nothing more than an act of the Legislature which deprived the Company of its property without just compensation as the price for staying in business, or in effect that HRT was given a choice between the "rock and the whirlpool".

HRT points to the record generally to support this argument (Pet. 11).

The *Frost* case, of course, does not hold that the waiver of a constitutional right is *per se* invalid. Instead it holds that a State may not in the absence of the proper exercise of its regulatory power *compel* the waiver of a constitutional right in exchange for the grant of a privilege. Accordingly, the applicability of *Frost* to this case depends on the element of coercion to compel the waiver of the constitutional right. There is, however, nothing in the record which provides even the slightest support for HRT's claims of "coercion". In fact it should be noted that HRT's complaint filed in the District Court does not even make the allegation that it was forced to accept the so-called "unconstitutional condition" in exchange for the franchise (R. 2-14), and in view of HRT's own exhibit the report of the directors to the shareholders (R. 48-58), set forth in Appendix D such an allegation would be difficult if not impossible to sustain.

This report, recommending acceptance of the franchise, provides no indication that the HRT directors were dissatisfied with the provisions of Section 20 or that they were recommending acceptance of otherwise unacceptable terms simply because there was no other choice if HRT wanted to stay in business, the so-called choice between the "rock and the whirlpool". It is true, of course, as HRT points out (Pet. 8) that its directors were faced with alternatives to accepting the franchise, which as prudent businessmen they had to consider. However, the alternatives were in no way

similar to the choices confronting Frost & Frost Trucking Company. HRT could continue to operate under its existing franchise for another 7½ or 8½ years. During this period the directors calculated that the stockholders would continue to receive an annual dividend of 8 per cent on their investment and at the termination of the franchise there would be sufficient resources to pay off all the debts of the Company and redeem the stock at par value with a possible surplus of 20 to 30 per cent. Its second alternative would have been to reject the new franchise and during the remaining 7½ to 8½ years on its existing franchise petition the Legislature for a more satisfactory franchise. According to the directors' report the only objection of the directors to the new franchise was that Congress had amended it to delete the provision requiring the approval of Congress in the event of its termination by the Territorial Legislature (R. 54-55). No objection, however, was made to Section 20. The third alternative, acceptance of the franchise, was chosen (R. 43).

Nevertheless, HRT points to the fact the franchise is in the form of an Act of the Legislature which it claims was presented to HRT on a "take it or leave it basis". (Pet. 11) With respect to HRT's first point, it is, of course, undeniable that the franchise is in the form of an act of the Legislature but Respondent City contends that this particular factor has no relevance to HRT's belated claim of coercion.

A franchise is a grant of a privilege conferred by a government on an individual which does not belong to

everyone as a matter of right. *New Orleans Gas Light Co. v. Louisiana Light and Heat Producing and Manufacturing Co.*, 115 U.S. 650, 659 (1885). The franchise must, therefore, emanate from the sovereign power of the government, *Grand Trunk Western Railroad Company v. South Bend, supra,* at 554, 555; *New Orleans Gas Light Co. v. Louisiana Light and Heat Producing and Manufacturing Co., supra,* at 659; *Territory v. Fung,* 34 H. 53 (1936), and it is an exercise of legislative power, *Blair v. Chicago,* 201 U.S. 400, 457 (1906); *Walla Walla v. Walla Walla Water Company,* 172 U.S. 1, 9 (1898); *Morita v. Public Utilities Commission of the Territory of Hawaii,* 40 H. 579, 583 (1954); *Gulick v. Flowerdew,* 6 H. 414, 432 (1883). Consequently, the franchise conferred upon HRT had to be an act of the Legislature and this fact alone does not make it any the less a contract.

HRT's second point, that it was presented with the franchise on a "take it or leave it basis" (Pet. 11), by which it apparently means that it had no part in drafting the franchise, is simply not supported by the record. On the contrary, the reports of the Committees on Territories of the House and Senate of the United States Congress (R. 243-247) indicate that the proposed franchise "was the subject of extended hearings, at which hearings representative of the municipality, *the company* and the public attended, was fully discussed with in public press, and with some amendments passed by the local Legislature" (R. 243 and 246).

Finally as the City has pointed out, the report of the directors provides no evidence of dissatisfaction on the part of the Company with the terms of Section 20. This omission is significant in view of HRT's claim that it was "coerced" into accepting the franchise. If HRT was in fact being coerced, it is reasonable to assume first, that the directors would be aware of it and, second, that this fact would have rated some mention in the report of the directors. Instead the report of the directors clearly shows that the franchise as adopted by the Territorial Legislature had the complete approval of HRT. In short, HRT's claim of coercion is not only without any support in the record, but the record affirmatively supports the City's position that HRT sought, bargained for and willingly accepted the franchise. The principle enunciated in *Frost & Frost Trucking Co. v. Railroad Commission, supra,* therefore, is wholly inapposite.

An additional point which undermines HRT's coercion argument is that HRT was the only transit company operating in the City and County of Honolulu in 1921 (R. 243, 246). It provided an essential public service which was as beneficial to the public as its continuation under a new franchise would be to HRT. Unlike the situation in *Frost & Frost Trucking Co.,* where one trucking company more or less would hardly concern the State of California and, therefore, give the State all of the bargaining power, HRT had a strong bargaining position of its own from which it could more than adequately protect its interests. If HRT was not offered a new franchise on terms it

felt it could accept, it could have, because of its powerful bargaining position, held out during the remainder of its existing franchise for better terms. By the end of its existing franchise, public pressure to insure the continuation and improvement of the mass transit service would certainly have persuaded the Territorial Legislature to consider a franchise for the Company with more favorable terms. HRT clearly realized this fact for in its directors' report to shareholders it says, "If the franchise in the form passed by Congress had been presented when the Legislature was considering the new franchise, the Company would have refused to approve it and the new franchise *would not have been passed* by the Legislature" (Appx. p. xxvi) (Emphasis added). This is tantamount to saying that HRT had a veto power over legislation it considered to be against its interests. How then can HRT now claim that it was coerced into accepting a franchise which it disliked? It is safe to assume that if HRT found Section 20 to be unacceptable the franchise would not have been passed by the Legislature. Also in this connection we refer to the report of the Public Utilities Commission to the Eleventh Legislature, Regular Session 1921 (pp. 64-69, Senate Journal 1921) set forth in Appendix E. The Public Utilities Commission reported that in considering proposals for a new franchise it did not consider Senate Bill 194 introduced at the 1919 legislative session because the Company specifically withdrew its support of that Bill (Appx. p. xxxiv). When this historical background of Act 286 is considered, it seems frivolous indeed for

HRT to claim at this late date that it was "coerced" into accepting the franchise.

c. The conditions of the franchise are appropriate to the grant by the territory of a special privilege to a private individual.

Assuming for the sake of argument that the franchise was a completely unilateral act of the Legislature which HRT had no part in drafting and could only accept or reject, the law is well settled that conditions imposed in the grant of a privilege are not *per se* invalid. *Frost* does not invalidate every obligation which the government may impose on an individual as a condition for the grant of a privilege. As the City argued before the Court of Appeals for the Ninth Circuit, the tendency of the decisions subsequent to *Frost* has been to separate the power to grant or withhold a privilege from the condition itself evaluating the later as it would any other exercise of the State's regulatory power,[1] and conditions that impose valid regulations have been upheld.

Stephenson v. Binford, 287 U.S. 251, 275-276 (1932);

Washington ex rel. Bond & G. & T. v. Superior Court, 289 U.S. 361, 364-365 (1933);

Nebbia v. N.Y., 291 U.S. 502, 537 (1934);

Watson v. Employees Liability Assurance Corp., 348 U.S. 66, 71-73 (1954);

Parden v. Terminal Railroad, 377 U.S. 184, 193 (1964).

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[1]73 *Harvard Law Review,* 1595-1607, Unconstitutional Conditions.

The same principle is applicable to conditions in government grants. This Court has not invalidated conditions in permits that are appropriate to the protection of the public interest, *U.S. v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940). In franchises the conditions, or consideration flowing to the government, must likewise be evaluated from the point of view of the objectives of the grant. The objectives of the HRT franchise was to insure the continuation of public transportation in the City of Honolulu. But at the same time there was a need to include conditions for the protection of the public interest from possible abuse of the grant by the grantee. Therefore, the appropriateness of the purchase provisions as part of the franchise must be considered within the context of the grant itself and the public interest to be protected.

It has been held that "a franchise is a special privilege conferred by the state on an individual, which does not belong to the individual as a matter of right", *Madden v. Queens County Jockey Club*, 296 N.Y. 249, 72 N.E.2d 697, 699 (cert. denied 332 U.S. 761) (1947). Consequently, for the protection of the public, courts have long sustained the practice of including in the grant a retained power to alter, amend or repeal the franchise, *Greenwood v. Union Freight R.R. Co.*, 105 U.S. 13, 20, 21 (1881); *Louisville Bridge Co. v. U.S.*, 242 U.S. 409, 418 (1917), and this does not affect its contractual nature. Another consideration unique to franchises is the principle that they are construed most strongly against the grantee. *Louisville Bridge*

Co., supra; Broad River Power Co. v. South Carolina, 281 U.S. 537, 543 (1930).

Transportation utilities in 1921 were approaching the peak of their prosperity. They were profitable as well as public necessities. The franchise grant, therefore, conferred a substantial ecnomic benefit on HRT. However, the Territory could foresee the possibility of the need arising at some future date for the City to take over the operation of the mass transit system in order to assure the continuation of this essential public service. In anticipation of that event, the Territorial Legislature deemed it prudent to include in the franchise a provision which would limit the purchase price to the investment in the business less depreciation due to the use of the equipment but excluding such elements as the appreciation in value of HRT's real estate and intangibles. The Territorial Legislature perhaps felt that it would not be in the public interest to permit HRT to enjoy all the economic benefits of a legislatively granted monopoly on public transportation in the City and County of Honolulu for as long as such service remained profitable, but when HRT's franchise became less profitable thereby forcing the City to assume the operation at public expense, to require the City to pay for such elements as the appreciation in the value of HRT's real estate or its intangibles. Because of the franchise grant HRT's investment in its plant was safe from the ordinary perils of business, the most important being competition. Therefore, in a sense the franchise gave HRT's stockholders a measure of security which

ordinary businessmen did not have. What is unreasonable about the reservation in the franchise of a condition that would enable the City to share some of the benefits which have accrued to HRT from the grant in the first place? This "price" which HRT agreed to pay for the grant is therefore clearly appropriate to the economic bargain between the Territory and the Company.

HRT is in no worse position than the respondents in *United States v. Appalachian Electric Power Co., supra,* and the appellants in *Fox River Paper Co. v. Railroad Commission,* 274 U.S. 651 (1927). In both cases this court upheld permit conditions which gave the government the right to purchase the property of the permittee constructed under the permit at a price which was less than its fair market value against the claim that such conditions were a taking of private property without the payment of just compensation. The decision of the Ninth Circuit is, therefore, in complete accord with the applicable decisions of this court with respect to the imposition of conditions for the protection of the public interest in grants of a privilege to private individuals.

II

THERE IS NO CONFLICT OF DECISION

Petitioner cites two cases in support of its claim that there is a conflict between the circuits, which this Court should resolve: *United Gas Pipeline v. Terrebonne Parish Police Jury,* 445 F.2d 301 (1971 5th Cir.) aff'g 319 F.Supp. 1138 (E.D.La. 1970) and

Midwest Video Corp. v. United States, 441 F.2d 1322 (8th Cir. 1971), rev'd 40 U.S.L.W. 4626 (June 7, 1972). There is, however, simply no conflict between either decision and the decision of the Ninth Circuit in *HRT, et al. v. Dolim, et al.,* ..... F.2d ..... (1972). *United Gas Pipeline, supra,* bears only the most superficial resemblance to the case presented by Petitioner. HRT is assailing a condition attached to the issuance of a building permit to construct a pipeline under a parish road. This condition was that United agree to comply with Ordinance No. 1682 adopted on April 8, 1970 by the police jury and "upon United also agreeing that if that proposed pipeline or any portion thereof interferes with any future public improvement in said parish, it, United, will alter, relocate or remove, at United's sole expense, the pipeline on that portion of the land covered and affected by the aforesaid right of way and servitude which United purchased from the South Code Corporation which is not under the road", 319 F. Supp. 1143. United also challenged Ordinance No. 1682 which purported to regulate the construction and maintenance of gas pipelines serving interstate commerce. The decision of the District Court and the Court of Appeals for the Fifth Circuit was that both the condition and the ordinance were invalid. The condition was invalid because it constituted a taking of United's property without the payment of just compensation and the ordinance was invalid because the Natural Gas Pipeline Safety Act of 1968 (49 U.S.C. 1671 et seq.) preempted state and local regulations of gas pipelines serving interstate commerce.

The decisions of both the District Court and Court of Appeals in *United* invalidating the condition is correct when the analysis of conditions attached to government grants referred to earlier in this brief is applied to the facts. If the condition requiring United to relocate its pipeline outside of the public right of way is considered apart from the privilege to be granted by the parish, in this case a building permit to construct a pipeline under a public road, it is clear that the condition would be invalid as an exercise of the State's regulatory power. The parish simply has no power to legislate the taking of United's property without the payment of just compensation. It is likewise not possible to justify the condition on the basis that it protects any legitimate public interest which is integrally connected with the granting of the building permit. The public interest in United's building permit cannot be expected to extend to the regulation of United's pipeline beyond the public right of way. In other words if Terrebonne Parish allows United to construct its pipeline across the public road, it should be entitled to impose reasonable regulations or conditions for the protection of the public interest which may include the relocation of United's pipeline within the public right of way in the event the pipeline should interfere with public improvements constructed in the right of way. The Court of Appeals for the Fifth Circuit recognized the propriety of such conditions when it said:

> "we do not hold that the Parish Police Jury cannot enact a valid ordinance requiring permits with reasonable conditions", 445 S. 2d at 302.

But the relocation of United's pipelines outside the public right of way bears no relevance to the protection of the social interests endangered by granting the building permit.

On the other hand, as the City has already argued in this brief, the purchase provisions in Section 20 which were agreed to by HRT, when considered in the context of the franchise grant, do protect a legitimate public interest. Furthermore, unlike the situation in *United Gas Pipeline Co. v. Terrebonne Parish Police Jury, supra,* it cannot be said that the franchise was in any way conditioned on the acceptance of the terms of Section 20 because as the record clearly shows HRT had considerable influence in drafting its franchise, and according to its directors could have prevented the passage of any franchise with the terms it found to be unacceptable.

The case of *Midwest Video Corp. v. United States, supra,* appears to provide even less support for Petitioner's asserted conflict between the circuits than *United Gas Pipeline, supra.* It is difficult to see any similarity between the issue before the court in *Midwest Video Corp.* and the issue before the Ninth Circuit in *HRT, et al v. Dolim, et al, supra,* from which a conflict between the Eighth and Ninth Circuits could have arisen. If anything, the decision of the Eighth Circuit was in conflict with the applicable decisions of this Court as can be seen from this Court's reversal of the Eighth Circuit decision in *U.S. v. Midwest Video Corporation,* 40 U.S.L.W. 4626 (1972). In fact that decision provides further

support for the proposition referred to earlier in this Brief that the government can require as a condition for the granting of a permit, compliance with certain provisions which benefit the public particularly when those provisions are an integral part of the permit. *Fox River Paper Co. v. Railroad Commission, supra; United States v .Appalachian Electric Power Co., supra.*

In *Midwest Video Corp., supra,* the only real issue before the court concerned the statutory authority of the Federal Communications Commission, under the Communications Act of 1934, as amended, (47 U.S.C. Sec. 151 et seq.) to require CATV operators with 3500 or more subscribers to "cablecast". The "conflict" between the Eighth and Ninth Circuits then is that the Eighth Circuit applied *Frost* to the case before it to invalidate the commission cablecasting requirement (held by this court to be within the statutory authority of the Commission to promulgate) whereas the Ninth Circuit held that *Frost* is inapplicable to this case. Significantly no reference was made to *Frost* in any of the opinions filed by this court in *U.S. v. Midwest Video, supra.*

CONCLUSION

Petitioner has failed to present to this Court any persuasive reasons for the granting of certiorari to the Court of Appeals for the Ninth Circuit.

The law has long been well settled that franchises such as the one HRT is presently assailing are con-

tracts. HRT is simply asking this Court to apply constitutional grounds to relieve it from a bargain which the record clearly shows it willingly entered into, not as a result of coercion, but from a bargaining position of some considerable strength. HRT's authorities invalidating the coerced waiver of constitutional rights as a condition for the grant of the privileged by the government are therefore inapposite. In accepting the terms of the franchise in 1921 HRT made a knowledgeable and voluntary waiver of its right to just compensation. Such a waiver of a constitutional right is clearly binding on the party making it particularly when the party has received all the benefits which can accrue therefrom.

HRT is correct in one respect, however, in that if it should prevail on its theory of unconstitutional conditions it will, as the Ninth Circuit Court of Appeals pointed out:

> ". . . gravely prejudice if not destroy the power of the government to utilize options to acquire property, through making it impossible for the seller to commit himself to a sale price. Hindsight would always be available to compel price adjustments on the theory that the price no longer constituted just compensation." *HRT, et al. v. Dolim, et al., supra.*

This would indeed have a substantial but adverse impact on transactions between the government and its citizens. HRT entered into a contract with the Territory in 1921, the terms of which were acceptable then but which HRT now finds not to its liking.

Plainly stated HRT seems to be saying that one who contracts with the government and later finds his obligations under the contract to be unacceptable, has the right to rescind the contract on constitutional ground that it was coerced into the contract in the first place even after accepting all of the benefits thereunder. The coercion in this case is apparently provided by the clarity of HRT's hindsight, viz HRT would not accept a similar franchise today.

For the foregoing reasons and authorities the City respectfully submits that the Petition for a Writ of Certiorari to review the judgment and opinion of the Ninth Circuit Court of Appeals should be denied.

Dated, Honolulu, Hawaii,
August 10, 1972.

Respectfully submitted,
PAUL DEVENS,
Corporation Counsel,
ROBERT M. EHRHORN, JR.,
Deputy Corporation Counsel,
Attorneys for Respondent City and County of Honolulu.

(Appendices Follow)

Appendix A

Honolulu, Oahu, T.H., March 28, 1921.

Honorable Charles F. Chillingworth,
President of the Senate.

Sir: Your Committee on Judiciary, to which was referred Senate Bill No. 30, known as the Rapid Transit Bill, begs leave to report, as follows:

This Bill was prepared by the Public Utilities Commission in compliance with Senate Concurrent Resolution No. 23 of the Special Session of 1919 requesting said commission to report on the question of terms that should be incorporated in any franchise that should hereafter be granted. The said resolution was adopted following the introduction of a franchise bill prepared by and presented in behalf of the Honolulu Rapid Transit and Land Company, the owner of the present and existing franchise, because of the fact that the said franchise bill then presented was introduced too late in the said session to allow for the full consideration that the importance of the measure demanded.

This bill was introduced by this committee in the form originally drafted by the Utility Commission, deferring our consideration of the terms thereof until after presentation and formal committal of same to us, so that hearings and consideration could be had thereon in more regular and due course.

We have held full hearings upon this bill extending over several days, at which were represented the Honolulu Rapid Transit and Land Co., the Board of

Supervisors of the City and County of Honolulu and the Utilities Commission. The said Company and Board each presented numerous objections and amendments, all of which were carefully considered and weighed, and after considerable discussion and deliberation extending over several additional days, we have concluded to recommend the passage of this bill with several amendments, said amendments being such as to have the said bill read as appended hereto and submitted herewith.

In deference to and in consideration of the care, able and painstaking efforts, and conscientious work of the Utilities Commission, as is evident by its report to the Senate pursuant to said resolution 23, we have sought so far as possible to sustain for recommendation the provisions of the bill as originally drafted, and we have departed therefrom in our recommendation only after very careful consideration we were convinced that the demands of fairness to the fare-paying public and the City and County as well as to the Company so required. However, the general theory and fundamental plan underlying and embodied in the original bill are not changed by the proposed redraft herewith presented, and our amendments go mainly to the details of administration and application.

The present franchise of the Honolulu Rapid Transit and Land Company expires in 1928. We believe that the best interests of the public require the granting of a new franchise to this company, and that such franchise be given as soon as possible. By so doing

Honolulu will not only be insured a continuity of the street car service, but will be guaranteed an immediate improvement upon the present system. We understand that as a result of the growth of the District of Honolulu, public convenience demands various extensions, betterments and improvements of its street car system, which would involve the expenditure of very large sums of money. With a tenure of but seven years, it cannot fairly be expected that the present owner of the franchise should make these large expenditures. By the passage of this Bill, however, the company would not only be in a position to effect these improvements on a basis of sound business investment, but could be compelled to do so as the convenience of the public and necessity of better service demand.

In considering the terms to be incorporated in the franchise this bill grants, our paramount and primary consideration has been that which proper regard for the rights of the fare-paying and general public demands, consistently with such proper considerations for the rights and investment of the company as will co-ordinate its interests to the needs, convenience and service rights of the public. We believe that the franchise granted by this bill is sufficiently liberal to the company to enable it by proper management to net it a fair return on its investment and encourage it to expend and improve its system to meet the demands and needs of the public, while sufficiently provided with such terms of public control as will prevent placing the public of the City and County at any disadvantage.

We therefore recommend the passage of this bill as amended in accordance with the re-draft of the bill hereto appended and herewith submitted.

Respectfully submitted,

J. W. Russell, Chairman.
L. M. Judd,
E. A. K. Akina,
A. F. Tavares,
William M. Ahia.

Appendix B

(Letterhead of
STATE OF HAWAII
Department of Accounting and General Services
Public Archives
Honolulu, Hawaii)

I, Agnes C. Conrad, Archivist of the Public Archives, of the State of Hawaii, do hereby certify that the attached document is a true and exact photographic copy of the preamble and Section 24, being a portion of Senate Bill No. 30, taken from the files of the 1921 Regular Session of the Legislature, Territory of Hawaii, on file in the Public Archives, at Honolulu, State of Hawaii.

Witness my hand and seal this 26th day of July, A.D., 1972, at Honolulu, State of Hawaii.

/s/ Agnes C. Conrad

Agnes C. Conrad, Archivist

Senate Bill No. 30
THE LEGISLATURE
of the
TERRITORY OF HAWAII

AN ACT

To amend an act entitled "An Act To Authorize and Provide for the Construction, Maintenance and Operation of a Street Railway or Railways in the District of Honolulu, Island of Oahu", enacted by the Legislature of the Republic of Hawaii, July Seventh, One Thousand Eight Hundred Ninety-Eight, and granting a franchise to the Honolulu Rapid Transit and Land Company to operate a Street Railway in the City and County of Honolulu, providing for the operation of the same and providing for the purchase of the same by the City and County of Honolulu.

Whereas, the Legislature of the Republic of Hawaii did, by an Act enacted on the seventh day of July, one thousand eight hundred ninety-eight, authorize Clinton G. Ballentyne and others, their associates and assigns, or such corporation as might be organized by them, to construct, maintain and operate a street railway or railways in the District of Honolulu, Island of Oahu; and

Whereas, pursuant to said Act the said Clinton G. Ballentyne and others did organize a corporation as provided in said Act, under the name of the Honolulu Rapid Transit and Land Company, which, since said date, has been exercising said franchise; and

Whereas, the Act of Congress to provide a government for the Territory of Hawaii, approved April

thirtieth, one thousand nine hundred, provided by the 73rd section thereof that said franchise, with others, should be ratified and confirmed, subject to the approval of the President of the United States; and

Whereas, such approval was given by William McKinley, President of the United States, on June twenty-fifth, one thousand nine hundred, to said franchise as then held by said Honolulu Rapid Transit and Land Company; Now therefore Be it Enacted by the Legislature of the Territory of Hawaii:

That the Act of the Republic of Hawaii enacted July seventh, one thousand eight hundred ninety-eight entitled "An Act to Authorize and Provide for the Construction, Maintenance and Operation of a Street Railway or Railways in the District of Honolulu, Island of Oahu", approved by the President of the United States under the authority of an Act to provide a government for the Territory of Hawaii, approved April thirtieth, one thousand nine hundred, ratifying and confirming said franchise, subject to said approval, is hereby amended to read as follows:

Section 1. Definitions. Wherever in this Act the following words occur they shall be held to have the force and meaning herein set forth unless the context clearly indicates otherwise:

'Railway' shall refer to and mean the rolling stock, busses or other vehicles of transportation whether operated on rails or not, rails, tracks, roadway, with its appurtenances, appliances and connections to be placed in streets, roads or places on the Island of

Oahu, and all land, power stations, houses, buildings, structures and machinery, franchises, and all property of every nature whatsoever owned or acquired, as by this Act provided.

Section 24. Purchase by City and County of Honolulu City and County authorized to purchase and operate.

At any time after authorization therefor by the registered voters of the City and County of Honolulu at an election held in the manner and form and under the terms and conditions as are now or may hereafter be provided for the issuance of bonds by the City and County of Honolulu, the City and County of Honolulu, or its successors, may upon not less than six months' notice in writing to the Company, acquire the property of the Company by paying to it cash equal to the par value of its outstanding capital stock, and assuming the bonded and all other debts and liabilities of the Company at the date of said purchase. And upon the payment of said purchase price and the assumption by the City and County of Honolulu of said obligations the franchise of the Company shall cease and determine and the railway and all other property owned and used in connection therewith by the Company shall become the property of the City and County of Honolulu without further conveyance but said Company shall execute all such further conveyances and give such further assurances as may be necessary to effectuate such purchase.

The City and County of Honolulu, or its successors, is hereby given the right under the conditions aforesaid to purchase, hold and operate the street railway

system or systems so purchased and said City and County and its successors shall have all powers incidental thereto.

The City and County of Honolulu may finance the purchase of the property of said Company by issuing bonds secured by said property and said bonds shall be a first charge on the income therefrom. Said bonds may be issued prior to the time of purchase containing provisions that they will become secured as herein specified as of the date of purchase but prior thereto shall be a lien upon the general revenues of the City and County. Said City and County may, at its option, make said bonds a lien on both the income of the railway and the general revenues of the City and County notwithstanding any limitation as to amount of indebtedness now or hereafter existing and the amount of said bonds shall not be considered to limit the creation of other indebtedness by said City and County as now or hereinafter provided by law. Provided, however, that all revenues derived from time to time from said railway so purchased shall be paid into the treasury of said City and County and there held as a special fund for the following purposes for which alone it shall be expended:

1. The operation and maintenance of said railway.

2. Interest on the bonds issued for such purchase and bonded or other indebtedness of the Company assumed by the City and County of Honolulu at the time of such purchase.

3. A sinking fund for the payment of said bonds and said assumed bonds and said other indebtedness for which purpose there shall be set aside each year

not less than such a sum that the aggregate of the sums so set aside with interest thereon compounded annually at the rate of interest specified in the said bonds and said other indebtedness would amount to the par value of the said bonds and said other indebtedness at maturity nor more than such a sum that the aggregate of such sums with such interest would amount to the par value of the said bonds or said other indebtedness when redeemable.

4. The extension and improvement of said railway.

Section 25. Amendment, Alterations or Repeal.

This act may be amended or altered in whole or in part or repealed by the Legislature of the Territory of Hawaii with the approval of Congress.

Section 26. Effective Date.

This Act shall take effect when the Company shall notify the Governor of the Territory of Hawaii in writing that it has accepted the terms hereof by an affirmative vote of the holders of two-thirds of the issued capital stock, provided such notice is so given within six months after the approval of this Act by Congress, otherwise this Act shall become null and void.

/s/ J. W. Russell,

Chairman, Senate Committee on Judiciary.

Appendix C

Decision No. 21.

Report of Decision
of the
Public Utilities Commission of the
Territory of Hawaii

In the Matter of the Application of the Honolulu Rapid Transit Company, Limited, for an increase in its rates of fare.

Decided September 19, 1924.

Before the Public Utilities Commission
of the Territory of Hawaii

In the Matter of the Application of the Honolulu Rapid Transit Company, Limited, for an increase in its rates of fare.

Before: R. E. Wooley, Chairman.
A. J. Gignoux and Walter Beali,
Commissioners

Appearances:

Messrs. Robertson & Castle (Mr. A. L. Castle)
for Honolulu Rapid Transit Company, Limited.

W. H. Heen, Esq.,
for City and County of Honolulu

Messrs. Smith & Wild (Mr. Arthur G. Smith)
for Public Utilities Commission of the Territory of Hawaii.

DECISION

The Honolulu Rapid Transit Company, Limited, (hereinafter referred to as the Company) on March 26, 1924, filed its petition with this Commission asking for a permanent increase in its present rates of fare, and for the making and fixing of such rules and regulations relating to the sale of tokens or tickets as may be just and reasonable. The Company requests the Commission's approval for rates on its street cars and the Kalihi Bus Service, including free transfers over the entire system, including transfers from bus to street car and street car to bus, as follows:

Full cash fare 7c

Full token or ticket fare, 4 rides for 25c (6 1/4c per ride).

Special rate for children, token or ticket fare, 3 rides for 10c (3 1/3c per ride).

In its petition the Company seeks to substantiate the suggested increase by the allegation that the proceeds derived from the present fares

"are insufficient to meet all reasonable costs of operation including taxes plus a fair return upon the total property of said company actually used for public utility purposes."

In support of this allegation the petition, among other things, states:

"III. That the fair value of the property of the company actually used for public utility purposes is not less than the sum of Three Million Dollars ($3,000,000.00), and the par value of its authorized, issued and outstanding capital stock is the sum of Two Million Five Hundred Thousand Dollars ($2,500,000.00).

V. That for the year ending December 31, 1922, the gross revenue of said company was the sum of $989,521.27 and the operating expenses, taxes, depreciation and interest the sum of $793,973.73 on its public utility property, with the then authorized, issued and outstanding capital stock of Two Million Dollars ($2,000,000.00).

VI. That for the year ending December 31, 1923, the gross revenue of said Company was the sum of $988,928.37 and the operating expenses, taxes, depreciation and interest the sum of $832,-512.96 on its public utility property, with the

then authorized, issued and outstanding capital stock of Two Million Five Hundred Thousand Dollars ($2,500,000).

VII. That the estimated gross revenue based on the said rates and charges for the year 1924 is the sum of $1,008,372.20 and the estimated operating expenses, taxes, depreciation and interest on borrowed money under efficient and conservative management is the sum of $933,-924.21, without any provision for any return to the investors whatsoever.

VIII. That during the years 1922 and 1923 the Public Utilities Commission of Hawaii authorized and approved expenditures on capital account in the total amount of $640,004.22, of which said amount the sum of $561,103.07 has been expended, as authorized and specified by said Commission, up to the 29th day of February, 1924, and for which capital stock in the total amount of Five Hundred Thousand Dollars ($500,000) par value was sold at par under authority of said Commission and the proceeds thereof used to pay for the additions, betterments, improvements and extensions as authorized, up to the amount of $500,000, making the total issued and outstanding capital stock, as above set forth, namely, $2,500,000.

X. That your petitioner believes that said rates of fare, or charges, will not be more than 'sufficient to meet all reasonable costs of operation of its said public utility system, including taxes, plus a fair return on the total property of said Company actually used for public utility purposes,' as provided in said Act 186 of the Session Laws of 1921."

[Pages 5–69 of the Decision are omitted here]

The Company through its president has declared its willingness to establish a depreciation sinking fund in accordance with the suggestions of this Commission. Details as to the setting up and regulation of the fund are not a part of this proceeding and may be left for later consideration. We expect the Company to come before this Commission with an appropriate application with a view to putting the suggested plan of depreciation insurance into early effect.

IX. Reports to the Commission.

In order to ascertain to what extent actual conditions will be met by the estimates contained in this decision, we expect the Company to furnish the Commission with monthly statements showing the effects of the changed rates on revenues, expenses and traffic characteristics in a form acceptable to the Commission.

X. Effective Date of Order.

The Commission's order will issue placing in effect the rates heretofore set out in this decision and making said rates effective as of October 1, 1924.

Public Utilities Commission of
The Territory of Hawaii

Ralph E. Wooley,
Chairman.

A. J. Gignoux,
Commissioner.

Walter Beall,
Commissioner.

Dated, Honolulu, T. H.,
September 19, 1924.

Appendix D

Rapid Transit Directors Recommend Acceptance of Franchise

Report of Directors Analyzes Status of Company and Discusses Reasons For and Against Three Alternate Courses Open For Adoption, viz.: (1) Absolute Rejection; (1) Reject and Apply For Amendment; (3) Accept and Attempt Finance Extensions

Directors Recommend Stockholders to Accept Franchise and Try to Finance—If Unsuccessful, Then Apply For Amendment

Report of a Special Committee of Directors of H. R. T. & L. Co. to the Directors.

To the Board of Directors of the Honolulu Rapid Transit and Land Company:

Your Committee to whom was referred the subject of preparing an analysis and statement concerning the pending new franchise recently passed by Congress, more particularly to formulate a statement to stockholders and other possible investors, with a view to ascertaining whether or not stock or bonds for necessary extensions and improvements can be successfully placed under the new form of franchise, beg to say that they have given the matter careful

consideration and come to the conclusion that the time between now and February 24th when the franchise must be accepted or rejected, is too short in which to secure such subscriptions.

Your Committee has therefore prepared for your consideration an analysis of the status of the Company, financial and otherwise, with a statement of the several alternate courses which the Company may pursue in this connection. Such analysis is submitted herewith for your consideration.

Your Committee recommends that the Board give this report its prompt attention and thereupon make such recommendation to the stockholders as it may see fit.

Respectfully submitted,

L. T. Peck,
L. A. Thurston,
H. S. Johnson,
Alfred L. Castle.

Honolulu, February 2, 1922.

What Shall Be Done With the New H. R. T. & L. Co., Franchise, Passed by the Legislature and Congress in 1921?

A Report Thereon to the Directors, by a Special Committee of Four, consisting of L. T. Peck, A. L. Castle, H. S. Johnson and L. A. Thurston.

1. *Expiration of Present Franchise.* The present franchise expires in June, 1929, or in 7½ years, according to the claim of the Government, or June, 1930, or 8½ years, according to the claim of the Company.

New Franchise Passed by Legislature. A new franchise was passed by the local Legislature of 1921, which provided for an indefinite term, subject to amendment or repeal by the Legislature, *"with the approval of Congress."*

The form of this franchise was approved by the company.

Amendment by Congress. This franchise was approved by Congress with the elimination of the above words "with the approval of Congress."

The Effect of the Amendment is that the new franchise may be amended or repealed by the local Legislature without right of appeal to Congress by the Company and without compensation if revoked.

Company Must Act by February 24, 1922. The Company is allowed six months within which to accept or reject the new franchise. The six months expires February 24, 1922.

Question Before the Company.

The question before the Company is:—
"What shall be done with the new franchise?"

There are three alternative courses which may be followed, viz.:

First Alternative

Reject the new franchise and stand pat on the Company's legal rights under the existing franchise, making no additions or improvements, except such as are necessary from the Company's own standpoint, to enable it to make the most out of the business; such,

for example; as increasing the number of cars and power, so far as it may be profitable to do so, to care for the increased traffic; also to add such tracks as may conduce to the same purpose.

Second Alternative.

Reject the new franchise and seek a satisfactory franchise from a succeeding Legislature and Congress.

Third Alternative.

Accept the new franchise and proceed under it.

Analysis of the Three Alternatives.

The following is a statement of the arguments for and against each suggested alternative plan.

Arguments For and Against First Alternative, Viz.:

Before this proposition can be considered intelligently, it is necessary to know and consider the present status and financial condition of the Company and have an estimate of what the financial outcome will be if this course is followed.

The following is an outline of such status and outlook:

Financial Status and Outlook Under Present Franchise, If Same Is Not Extended.

This statement is based upon the assumption that it expires in 1930.

Present Debt of Company. The only debt of the Company is an open account of $135,000.00 owed to the bank, bearing interest at the rate of 6% per annum.

Present Issued Capital Stock of the Company. The issued capital stock of the Company amounts to $2,000,000, divided into 20,000 shares of a par value of $100 each.

If the Company is to liquidate at the end of the franchise, without loss to the stockholders, it must accumulate sufficient surplus, which, together with the sale value of its then remaining property, will pay off said debt of $135,000 and pay to its stockholders the said par value of their stock—$2,000,000; or a total sum of $2,135,000.

Can This Be Done?

The following is an analysis, and estimate of the probabilities upon this point:

Resources From Which to Pay Debt and Redeem Stock at Par.

The money for these purposes can come from but three sources, viz.:

1. Present Reserve Sinking Fund and interest thereon;
2. Surplus to be accumulated from profits during the remaining term of the franchise.
3. Sale value of the property of the Company at termination of the present franchise.

Estimate of Money Available From Foregoing Resources.

The following is an estimate of the amount available from the foregoing sources, viz.:

1. *Estimated Amount Available From Present Reserve Sinking Fund.*

Principal (now invested in Mainland bonds) approximately	$227,000
Compound interest thereon at 5% for 8½ years	116,367
Total	$343,367

The market price of the bonds in which this fund is invested is now approximately 12-15% below the price at which they were bought; but their market price is rapidly rising, and the probability is that they can soon be sold at cost, if so desired, and the proceeds invested in bonds returning 6% or 7%. If this is done it would increase this resource by some $50,000 odd.

2. *Estimated Surplus Profits During Remaining 8½ Years of Present Franchise.*

The gross receipts during the past 5 years have rapidly and steadily increased.

They are as follows:

Year.	Gross Receipts.	Increase Over Previous Year.
1917	$726,000	$57,000
1918	735,000	9,000
1919	780,000	45,000
1920	861,000	81,000
1921	960,000	99,000

The average net annual profits for the 5 years 1912-16, both inclusive, were $198,959.

The average net annual profits for the 5 years 1917-21, both inclusive, were $244,089.

An average annual increase of the second five-year period over the former of $45,130.

It is believed that the future gross revenue will continue to increase based on the steady growth of the city.

It is further believed that the average net annual profits will also continue to increase, for the reason that, while gross receipts are increasing, the price of material is decreasing and the rate of wages is at a standstill.

It is therefore deemed safe to estimate upon a continuance of the average surplus profits of the past 5 years, during the remaining years of the franchise, with the possibility, if not the probability, of there being a considerable excess.

On the 8½-year basis this would amount to	
$244,089 × 8½	$2,094,801
Less current annual dividends at 8% on $2,000,000 stock—$160,000 per annum for 8½ years	1,360,000
Balance from this source available for redemption of stock	$ 734,801

3. *Sale Value of the Property at Termination of Present Franchise.*

The original cost of the present tangible assets was over $2,750,000. It has been kept in first-class repair and replacements have been made wherever necessary.

The following schedule and estimate of value is made by Manager Stuart Johnson, who states that it is made on a conservative selling-out basis.

The Real Estate is estimated at present value plus a conservative estimated appreciation of approximately 7%.

The Rail and Wire Systems are estimated at a value at which the successor could not afford to let them be removed.

Condensed Schedule of Property and Value at End of Present Franchise.

Land and Dwellings		$ 500,000
Tracks, Poles and lines	$620,000	
Cars and Equipment	309,500	929,500
Power Plant, Car Houses, Shops and Equipment	$150,000	
Material and Supplies	50,000	200,000
Total Sale Value		$1,629,500

Summary of Estimated Resources From Which to Pay Debt and Redeem Stock at Termination of Franchise—8½ Year Basis.

1. Reserve Fund and compound interest at 5%	$ 343,367
2. Surplus profits	734,801
3. Sale value of property at end of franchise	1,629,500
Total	$2,691,317
Amount required to pay debt and redeem stock	2,135,000
Excess over amount required	$ 556,317

= $27.80 per share.

Resources on a 7½ Year Basis.

If the franchise has only 7½ years to run the foregoing estimate would be revised as follows:

Reserve fund and compound interest at 5%	$ 327,367
2. Surplus profits	650,716
3. Sale value of property at end of franchise	1,629,583
Total	$2,607,583
Amount required to pay debt and redeem stock	2,135,000
Excess over amount required	$ 472,583

= $23.63 per share.

Summary of Estimated Resources From Which Debt Must Be Paid and the Stock Redeemed.

From the foregoing there seems to be no doubt that the resources from which the debt must be paid and stock redeemed at par are ample for the purpose, with the possibility of a surplus at 20% to 30%.

It is therefore legally possible for the stockholders to reject the new franchise, make no further additions to or improvements in the plant, except such as are for their own benefit, receive dividends at the rate of eight per cent per annum and come out whole at the termination of the franchise.

Reasons Against First Alternative.

Reasons against alternative number 1, are:

1. *The Public Necessity For Immediate Extension and Expansion* of the system is so great that no course inconsistent therewith is morally justifiable if

any other plan can be adopted consistent with the financial safety of the stockholders.

2. The unpopularity of this course would make it very unpleasant for directors and stockholders.

Second Alternative.

Reject the New Franchise and Seek a Satisfactory Franchise from a Succeeding Legislature and Congress.

Arguments For and Against the Second Alternative.

Points in Favor of the Second Alternative.

1. The New Franchise is unfair to the Company.

(1) *Legislature Can Repeal Franchise.* It gives the local Legislature complete power to amend or cancel the franchise, without appeal on the part of the Company, without compensation if revoked.

Other Utility Companies. No other Utility Company in Honolulu is subject to these provisions unless the act of the Legislature is approved by Congress.

It is unfair to thus discriminate against the R. T. Co.

(2) *The Franchise Provides Unsafe Security.*— The New Franchise provides such unsafe security on which to issue stock or bonds with which to finance extensions and improvements that they cannot be sold, and the present invested capital is not safeguarded.

The New Franchise is in the nature of a lease which can be terminated at the will of the lessor, without the consent of the lessee.

In case of the termination of the franchise, the Company will be left with a plant of high value as a going concern; but largely of junk value only, if it has to be removed from the streets.

It is useless to accept the franchise, unless the Company can secure money with which to make the necessary extensions and improvement.

If the Company accepts the franchise without the assurance that it can finance necessary extensions and improvements it will assume an obligation which may be ruinous to its stockholders, involving the loss of all, or a large part of their present property, which is now practically free from debt.

(3) *Congressional Amendment Without Knowledge or Consent of Company.* The amendment deleting the provision requiring the approval of Congress to an act by the Hawaiian Legislature to repeal the franchise, was made without the knowledge or consent of the Company. The amendment was not made at the request of any Hawaiian authority.

The Hawaiian Legislature, the Territorial Utilities Commission and the Honolulu Board of Supervisors had all approved of the clause providing that the Legislature could not amend or repeal the franchise, except upon the approval of Congress.

If the franchise in the form passed by Congress had been presented when the Legislature was considering the new franchise, the Company would have refused to approve it and the new franchise would not have been passed by the Legislature.

The appeal to Congress provided a vital safeguard against arbitrary action against the Company by the Legislature.

Why should the Company now waive this safeguard and accept an indefinite franchise, which was not asked for by any local authority and which involves the possible loss or radical depreciation in value of its securities worth approximately $3,000,000; all of which can be redeemed at not less than par if the new franchise is rejected and operations continued under the old franchise until its expiration. There will be four sessions of the Legislature before the expiration of the present franchise, any one of which can be asked to safeguard the Company in a definite contract by amendment of the existing franchise.

Points Against the Second Alternative.

1. *Rejection of the Franchise Will Cause a Long and Indefinite Delay in Making Extensions and Improvements.*

The next Legislature does not meet until the Spring of 1923. The first regular session of Congress thereafter does not meet until December, 1923.

There is no likelihood that the present Congress which passed the new franchise will reconsider it; and, at best, any action by Congress will be difficult and unlikely before late in 1923.

If the amendment desired were ultimately passed, in all probability the earliest construction work that could be undertaken by the Company under it would be well along in 1924.

2. *The Necessity for Extensions and Improvements* are so great that delay caused by the Company rejecting the new franchise, whether justified or not, may excite such resentment on the part of the public as to make it exceedingly doubtful whether any further amendment to the franchise would be granted by the Legislature.

3. *Possibility of Selling R. T. Stocks and Bonds.* It cannot be known beforehand, without steps being taken to ascertain the facts, whether R. T. stocks and bonds can be sold under the new franchise.

No such attempt has yet been made, and the time left in which to make the attempt is too short in which to ascertain with any certainty, whether such attempt would meet with success.

Even if the attempt were made prior to acceptance of the franchise, it would largely be a "straw vote" and not decisive as would be the case if the franchise had actually been accepted and the call for stock subscriptions were actual and not tentative.

If the franchise is accepted, and a bona fide attempt is made to place stock and fails, the foundation will have been then laid for a further appeal to the present session of Congress with a presentation of the facts. If that fails, resort can then be made to the next Legislature and the following Congress, with a demonstration that the proposed new franchise is unworkable, in which case there would be a fair chance for securing amendments necessary to finance the Company.

4. *Company's Consent to Form of Franchise Permitting Repeal with Approval of Congress Without Purchase Clause, Weakens Its Objection to the Amended Franchise.* The Company consented to the clause permitting repeal without purchase, provided the Legislature and Congress both approved.

The only change is that the Legislature alone is given the power to cancel. The Company having conceded this principle, the mere fact that the provision for the approval of Congress has been eliminated does not carry the weight that it would have done if such consent had not been given.

The Third Alternative.

Accept the New Franchise and Proceed Under It.

Reasons For and Against the Third Alternative.

The reasons in favor of the third alternative are:

1. *It clears the way* for proceeding immediately with the required extensions and improvements, if they can be financed.

2. *No Practical Danger in Power of Repeal.* Although the new franchise gives theoretical power of repeal of the franchise, the practical danger of its exercise is remote.

During the twenty-two years of the life of the Company, repeated attacks upon the Company have been made by successive public officials which have been carried to the Legislature and the Courts; but in every instance the Company has been sustained by both the Legislature and the Courts; and in no in-

stance have either Legislature or the courts shown themselves inimical to or unfair to the Company.

If the Company proceeds in a bona fide way to make necessary extensions and improvements and to give a high class service, there is no reason to believe that hostile action will be taken by the local Legislature.

If a hostile or unfair attitude is assumed by the Legislature there is nothing to prevent the Company appealing to Congress for relief.

If the third alternative is determined upon the franchise should be accepted, and steps then immediately taken to ascertain whether new shares of the Company can be placed with which to make extensions and improvements. This should be done in the same manner as outlined above under discussion of the second alternative.

Recommendation by Directors to the Stockholders.

At a meeting of the directors of the Company held in Honolulu Friday, February 3, 1922, it was unanimously voted that:

"The directors of the Company having carefully considered the foregoing report recommend to the stockholders that the third alternative as above outlined be adopted namely, that the franchise be accepted; that upon the acceptance of the franchise an earnest effort be then immediately made to finance the necessary extensions and improvements and proceed with them; and that if the attempt to finance fails, the facts should then be laid before Congress

and the Legislature, and such amendment to the franchise secured as will enable the Company to finance itself.

"The directors believe that in such event the Legislature will give the Company a square deal and enact amendments which will enable the Company to make the extensions and improvements necessary for the public welfare.

"The directors also urge the presence of each and every stockholder at the special meeting to consider action on the proposed franchise which is to be held at the Chamber of Commerce rooms in Honolulu, Thursday, February 16, at 2 P. M. In order to accept the new franchise there must be an affirmative vote of two-thirds of the issued and outstanding capital stock of the Company. At present there are 20,000 shares issued and outstanding, so that in order to accept the franchise there must be an affirmative vote of not less than 13,334 shares. If your stock is not represented at the meeting it is in effect a negative vote. If you can not be present in person, kindly send a proxy."

I hereby certify that the foregoing is a full and correct copy of the report of the directors of the Honolulu Rapid Transit and Land Company, and of the Resolution adopted by said directors.

Alfred L. Castle,
Secretary, H. R. T. & L. Co.

February 3, 1922.

Appendix E

Honolulu, T.H., Feb. 23rd 1921.

To the Honorable

The President and Members of the
Senate of the Territory of Hawaii.

Gentlemen: In compliance with Senate Concurrent Resolution No. 23 of the Regular Session of 1919 requesting the Public Utilities Commission of the Territory of Hawaii to investigate and fully report on the question of the terms that should be incorporated in any franchise hereafter to be granted, or the terms of any amendments hereafter made to any existing franchise for any street railway company or companies in the City and County of Honolulu, said report to be made to the Senate and House of Representatives of the Territory of Hawaii of the Legislative Session of 1921, and in compliance with the understanding between the Committee on Judiciary of the Senate of the Special Session of 1920 and the Commission set forth in the report of said Committee, we respectfully report as follows:

We are of the opinion that it would be inadvisable for the Legislature to enact legislation on this question other than in the form of a complete bill providing for such franchise, as the different portions of a bill of this nature are so interrelated that all sections must be considered together in order to prevent conflicts between sections and conflicts between the theory underlying the amendments and the theory underlying the original bill. In consequence we feel

that a mere enumeration of certain specific terms that we believe should be incorporated in any franchise would be of no value whatever to your Honorable Bodies unless the remaining terms of such franchise were properly co-ordinated to the terms deemed advisable. We therefore submit to you a complete bill and not mere disjointed paragraphs to be inserted in some other bill.

We believe that it is the intent and understanding of the members of your Honorable Bodies that any new street railway franchise for the City and County of Honolulu granted should be granted to the Honolulu Rapid Transit and Land Company, the present holder of a franchise to operate a street railroad in the District of Honolulu, and that such new franchise should be substituted for the existing franchise held by said Company: that the taking effect of such new franchise should operate as an extinguishment of any claims or rights the said Company may have under its present franchise, and, on the other hand an extinguishment of any claims the Territory of Hawaii may have under or on account of the existing franchise. In consequence, therefore, we have prepared our bill in the form of a new franchise for the Honolulu Rapid Transit and Land Company.

We have carefully considered Senate Bill No. 28 of the Special Session of 1920, a proposed substitute bill for said Senate Bill No. 28 submitted to the Commission by the Company and a proposed substitute bill submitted to the Commission by the City and County Attorney's office and have held many and

lengthy public hearings on all of said proposed bills. The Commission has not considered Senate Bill No. 194 of the Legislative Session of 1919 for the reason that the Company specifically withdrew its advocacy and support of such bill on the grounds that at the present time such bill was not satisfactory and undesirable, in which opinion we concur. We, therefore deemed it inadvisable to spend time or funds in further consideration of said Senate Bill No. 194.

As a result of the Commission's investigation and deliberation, the Commission finds the only practical way of presenting its views to your Honorable Bodies to be the presentation of a complete bill providing for a franchise for said Company, and we transmit herewith for introduction in the Senate by the Committee on Judiciary of the Senate a bill entitled:

"An Act

To amend an act entitled 'An Act to authorize and provide for the construction, maintenance and operation of a street railway or railways in the district of Honolulu, Island of Oahu,' enacted by the Legislature of the Republic of Hawaii, July seventh, one thousand eight hundred ninety-eight, and granting a franchise to the Honolulu Rapid Transit and Land Company to operate a street railway in the City and County of Honolulu, providing for the operation of the same and providing for the purchase of the same by the City and County of Honolulu,"

providing for such franchise.

The bill as proposed by the Commission differs radically from Senate Bill No. 28 and the proposed substitute bill furnished by the Company to the Com-

mission, and that contended for by the City and County Attorney.

Among the more important provisions of the bill we call your attention to the following:

I. Term of Franchise–Indeterminate (Section 2 of the Bill). It is obvious that rates which will enable a street railway system to earn a fair return upon its plant and set aside a sinking fund sufficient to reimburse the stockholders the cost of such plant within a limited period of years will be much higher than if the said railway is not under such obligation and is given a term which depends upon it satisfactorily performing its duties. The interests of the public are protected by placing the utility under the control of the Public Utilities Commission, giving to the Legislature with the approval of Congress power to amend, alter, or repeal the franchise.

II. Extent of Franchise–City and County of Honolulu (Section 2 of the Bill). We believe that the franchise should provide for the possibility of future extensions outside of the District of Honolulu as the necessity of the future may require. It is impossible to foresee the future growth or transportation requirements of the City and County of Honolulu, and it should not be necessary to obtain an amendment of the franchise whenever an extension outside of the District of Honolulu is found necessary. The interests of the Company and of the public will be adequately protected against unreasonable extensions by the provisions of the Bill relating to extensions (Section 16), and the proviso preventing competition with an existing railway when such is adequately serv-

ing the district, protects other utilities and also prevents wasteful duplication of capital and unnecessary competition.

III. Paving Obligations (Section 6). Under this bill the Company is obligated to lay initial paving and to maintain and keep in repair all paving between its outside rails whether laid by it or not.

Under the present franchise the Company is obligated to pay for all paving or repaving of its portion of the streets and in addition keep the same in repair but make no other payment to the City and County.

The Company is not the sole user of the pavement of the streets between its tracks. All that should be justly required of the company is that it make good the additional expense caused by the existence of its railway on the streets.

The Commission in endeavoring to ascertain how much this increased expense amounted to called upon the City and County for testimony on such question. The City and County's experts were unable to give either figures on such question or any basis of calculation from which figures could be obtained.

We believe that a certain amount of increased expense is caused by the existence of the street car tracks upon the streets due, 1st, to slightly increased expense of laying paving in sections rather than over an entire street, and 2nd, to deterioration in the street caused by water seeping under the street pavement, and by vibration of the street car tracks. We do not believe that this expense amounts to enough to justify

the imposing upon the Company of the obligation to perpetually pave, repave and maintain that portion of the street between one foot outside of its outside rails.

We likewise feel that the contention of the City and County that it should be compensated for the obstruction of its streets and the increased density of traffic on its streets has no merit for the reason that a street car service is a public convenience and necessity and the disadvantage caused to the public is more than compensated by the convenience of a street railroad.

We think that substantial justice will be done in the premises by limiting the Company's obligation to initial paving and thereafter maintaining and compensating the City and County for any loss caused to it and for reasonable rental for the use of its streets by the payment by the Company to the City and County of 4 per cent (4%) of its gross receipts as provided for in Section 17.

Under this Section we have provided for initial regulation as to location, relocation of tracks, paving and maintenance thereof by the Board of Supervisors with a right in the Board of Supervisors to make the necessary changes if the Company fails or refuses so to do with an appeal to the Commission, the Commission's decision being final. This limitation of appeal is included for the reason that the determination of such questions should be speedy and the opportunity for long delays due to a series of appeals eliminated.

IV. *Initial Valuation* (Section 9). The Bill provides for a valuation of the physical property of the Company by the Commission thirty days after the acceptance of this franchise by the Company, and that the capital stock shall be made to correspond to such valuation, the expense of such valuation to be borne equally by the City and County and the Company.

V. Additional Stock and Bonds, Notes and Indebtedness (Sections 10, 11 and 12). Additional stock and bonds, notes and indebtedness may with the approval of the Commission be issued, but stock can only be issued from the amount of funds actually received and expended by the Company. These sections prevent the capitalization of any expenditures out of the income and also the redemption of bonds with stocks of a greater amount than the actual cash received. In no case can the capital stock of the company be issued for a greater amount than the cash actually expended by the Company.

VI. Additions, Extensions, Increases, Betterments, and Improvements (Section 16). Under this Section additions, extensions, increases, betterments and improvements can only be made after the approval of the Commission or when directed by the Commission after an investigation and determination that the earnings of the Company when maintaining its entire plant including such additions, extensions, increases, betterments and improvements will be able to meet the reasonable cost of operation plus a fair return on the total plant of the Company. The Section also pro-

vides for a discontinuance with the approval of the Commission of such extensions as may turn out to be a burden on the entire system.

VII. Annual Payment to the City and County (Section 17). This Section provides for a payment of 4 per cent (4%) of the gross receipts to the City and County as distinguished from the ordinary payment of 2 1/2 per cent (2 1/2%) required of other utilities. This increased percentage we consider fair in view of the provision with regard to paving and also in view of the much greater use of the streets made by this Company as compared to other utilities which are paying 2 1/2 per cent (2 1/2%). This Section together with the paving section in our opinion does full and complete justice to the City and County.

VIII. Purchase by the City and County (Section 24). The City and County is authorized to purchase the railway system by paying the amount of outstanding stock and assuming all outstanding liability of the Company. We have added to the provision suggested by the City and County a requirement that such purchase can only be made after the same had been authorized by the registered voters of the City and County of Honolulu at an election held under such terms and conditions as now or may hereafter be required for the issuance of bonds. As the purchase of this system would require the issuance of bonds we feel that the taxpayers should pass upon this matter in the same manner as in the case of any other bond issue made by the City and County. In addition

we have specified the disposition of revenues received from the operation of the railway. We think that the latter is necessary.

IX. Control by the Commission (Sections 18 and 19). These two sections provide for complete control by the Commission of rates, regulations, conditions of employment, wages of employees, systems of accounting and in general complete control over the Company in its dealings with the public and its employees. In our opinion this is far preferable to an attempt to enumerate in detail the provisions as to fares, wages, pension and other provisions relating to the operation of the railroad.

Section 19 provides for an appeal from every order, direction and decision of the Commission which can be taken advantage of by any party in interest.

X. Fares. As pointed out in the previous paragraph the question of fares is handled under the general control by the Commission. In our opinion it is impossible to foresee what fare will be just and reasonable as the experience of street railways throughout the country during the past few years has amply demonstrated. Any fixed fare or any limitation with regard to fare may in the future prove too high or too low or to operate unjustly and there would be no possible remedy except by amendment to the franchise.

XI. Penalties (Sections 20 and 23). In addition to the provision relating to forfeiture of the franchise by the Company for failing or refusing to carry out

the provisions of its franchise or lawful orders issued thereunder this Bill also provides for the individual liability of officers and employees of the Company who are responsible for such violations.

We have not attempted to discuss all of the provisions of the franchise as we are of the opinion that the other provisions of the bill speak for themselves.

Respectfully submitted,

Public Utilities Commission of
the Territory of Hawaii,

William T. Carden, Chairman.
I. M. Stainback, Commissioner.
A. J. Gignoux, Commissioner.